(6)

PROCEEDINGS AND ORDERS DATE: 040285

CASE NBR 84-1-00436 CFX
SHORT TITLE Honig, Bill, etc., et al. DOCKETED: Sep 17 1984
VERSUS Students of CA, et al.

Date	Proceedings and Orders
Sep 17 1984	Petition for writ of certiorari filed.
Oct 24 1984	DISTRIBUTED. November 9, 1984
Oct 31 1984	Supplemental brief of petitioners Bill Honig, et al. filed.
Nov 6 1984	Response requested.
Dec 7 1984	Brief of respondents Students of CA, et al. in opposition filed.
Dec 12 1984	REDISTRIBUTED. January 11, 1985
Feb 1 1985	REDISTRIBUTED. February 15, 1985
Mar 25 1985	REDISTRIBUTED. March 29, 1985
Apr 1 1985	Petition GRANTED. Judgment VACATED and case REMANDED Dissenting opinion by Justice Marshall with whom Justice Brennan and Justice Stevens join. Opinion per curiam. Justice Powell OUT.

****

BEST AVAILABLE COPY

84-490 (1)

Office - Supreme Court, U.S.
FILED
SEP 17 1984
ALEXANDER L. STEVAS
CLERK

No. .....

In The

Supreme Court of the United States

October Term 1984

Bill Honig, Superintendent of Public Instruction for the State of California, and William Anthony, Director of General Services for the State of California,

Petitioners,

v.

Students of The California School for the Blind, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN K. VAN DE KAMP, Attorney General of the State of California

THOMAS E. WARRINER
Assistant Attorney General

MARGARET A. RODDA
DENNIS ECKHART*
Deputy Attorneys General

THOMAS K. MCGUIRE
Attorney at Law

1515 "K" Street, Suite 511
Sacramento, California 95814
Telephone: (916) 324-5348

Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

114 PP

QUESTIONS PRESENTED

1. Whether the Education for All Handicapped Children Act (20 U.S.C. § 1401 et seq. "EAHCA") confers federal subject matter jurisdiction over claims involving the seismic safety of schools.

2. Whether section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794, "§ 504") confers federal subject matter jurisdiction over claims involving the seismic safety of schools.

3. Whether, if jurisdiction is conferred by § 504, schools for handicapped children must meet a more stringent standard of seismic safety than do schools which only non-handicapped students attend.

4. Whether, in the absence of any federal seismic safety standards for schools, the Eleventh Amendment bars the federal courts from imposing seismic safety standards on schools other than those imposed by state law.

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	1
Jurisdiction	2
Statutory and Regulatory Provisions Involved	2
Statement of the Case	3
Reasons For Granting The Writ:	
I. The Decision Below Conflicts With Decisions of This Court as to the Scope of Claims and Remedies Cognizable Under EAHCA and § 504	7
A. EAHCA	7
B. Section 504	9
II. The Decision Below Significantly Broadens the Scope of EAHCA and § 504, Which Will Create Difficult and Recurring Problems for State and Local Education Officials, State Legislatures and the Lower Courts.	12
III. This Court Should Grant the Writ Even Though the District Court's Order is Styled as a Preliminary Injunction and the State Officials are Complying With its Terms.	16
Conclusion	17
Appendix A—Opinion	App. 1
Appendix B—Supplemental Findings of Fact and Preliminary Injunction	App. 25
Appendix C—Memorandum of Decision	App. 36
Appendix D—California Education Code §§ 39002 and 39002.5	App. 64
Appendix E—California Education Code §§ 39140-39157	App. 67
Appendix F—California Administrative Code Title 21 and Title 24	App. 81

TABLE OF AUTHORITIES

Pages

CASES:

American Public Transit Authority v. Lewis, 665 F.2d 1272 (D.C. Cir. 1981) 10

Board of Education v. Rowley, 458 U.S. 176 (1982) 8, 9, 12

Colin K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983) 10

Fallis v. Ambach, 710 F.2d 49, 54 (2d Cir. 1983) 9

Kruelle v. New Castle School Dist. (3rd Cir. 1981) 10

Monahan v. State of Nebraska, 687 F.2d 1164 (8th Cir. 1982), *cert. den.* 103 S.Ct. 1252 10

New Mexico Assoc. for Retarded Children v. State of New Mexico, 678 F.2d 847 (10th Cir. 1982) 10

Pennhurst State School v. Halderman, 451 U.S. 1, 24 (1981) 8

Pennhurst State School v. Halderman, — U.S. —, 104 S.Ct. 900 (1984) 15

Smith v. Robinson, — U.S. —, 104 S.Ct. 3457 (1984) 8, 9, 12, 13

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 10

Texas v. Tatro, — U.S. —, 104 S.Ct. 3371 (1984) 12

Tilton by Richards v. Jefferson County Board of Education, 705 F.2d 800, (6th Cir. 1983) cert. den. 104 S.Ct. 998 9

Youngberg v. Romeo, 457 U.S. 307 (1982) 10

STATUTES AND TEXTS:

20 U.S.C. § 1401 (18) 2, 7, 8

20 U.S.C. § 1412(5) (B) 11

20 U.S.C. §1414(a) (1) (c) (ii) 12

28 U.S.C. § 1254(1) 2

TABLE OF AUTHORITIES—Continued

	Pages
29 U.S.C. § 794	2
34 C.F.R. § 300.550(b) (1)	12
45 C.F.R. § 84.34(c)	3, 11
California Education Code §§ 39002 and 39002.5	3, 5
California Education Code §§ 39140-39157	3
Title 21 and Title 24 California Administrative Code	3

No. .....

In The

Supreme Court of the United States

October Term 1984

Bill Honig, Superintendent of Public Instruction for the State of California, and William Anthony, Director of General Services for the State of California,

Petitioners,

v.

Students of The California School for the Blind, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Bill Honig, the Superintendent of Public Instruction for the State of California, and William Anthony, the Director of General Services for the State of California ("state officials"), respectfully request this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 29, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 736 F.2d 538, and appears as Appendix A, App. 1-24. The

opinion of the District Court for the Eastern District of California, filed December 9, 1983, is unreported and appears as Appendix B, App. 25-35. An earlier opinion of the District Court in this same case, filed August 17, 1982, also unreported, appears as Appendix C, App. 36-63.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title 20, United States Code section 1401(18) provides:

> "The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title."

Title 29, United States Code section 794, provides in relevant part:

> "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be

denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Title 45, Code of Federal Regulations section 84.34(c) provides:

> "*Comparable facilities.* If a recipient, in compliance with paragraph (a) of this section operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient."

California Education Code sections 39002 and 39002.5 (set forth in Appendix D, App. 64-66) establish the California requirements for geological and soil engineering studies of a school site prior to its acquisition and prior to construction thereon.

California Education Code sections 39140-39157 (set forth in Appendix E, App. 67-81) establish the California requirements for design and construction of school buildings under the supervision of the State Architect.

Title 21 and Title 24 of the California Administrative Code contain the general standards and requirements of the State Architect regarding the design and construction of school buildings. (Pertinent sections are reproduced in Appendix F, App. 81-91.)

STATEMENT OF THE CASE

In 1974, California purchased a ninety-acre site in Fremont, California, for purposes of relocating from Berk-

eley, California, the California School for the Blind ("CSB") and the Northern California School for the Deaf. Prior to acquisition of the site, two geological and soil engineering studies were conducted. Later, but prior to construction on the site, a further geological and soil engineering study was conducted. The Office of State Architect, Structural Safety Section ("OSA") reviewed these geological and soil engineering reports and reviewed and approved the structural design and specifications for both schools in light of the reports and in accordance with the requirements of California law.

Construction of the new schools was completed in mid-1980. Because of various pretrial proceedings in this case, CSB opened late at the new site in November of 1980. It has operated there ever since that time, serving about one hundred blind and blind, multi-handicapped children from 5 to 22 years of age, who come from school districts all over the state.

On June 20, 1980, a group of about one-quarter of the students and their parents and guardians ("CSB students") initiated this proceeding. Their complaint challenged the relocation of CSB from Berkeley to Fremont on procedural grounds and on the substantive ground that the CSB facilities and the community in Fremont were not appropriate for the education of blind, multi-handicapped children.[1]

---

1. Although the complaint contained two paragraphs alleging the seismic unsafety of the CSB site, it made no reference to the provisions of California law governing such matters, nor did it attempt to set forth a claim of seismic unsafety under either state or federal law.

On August 15, 1980, the cause was certified as a class action on behalf of all present and future students of CSB and their parents and guardians.

At the time of the pretrial conference in March of 1981, the CSB students for the first time asserted a pendent claim that the state officials had violated California Education Code section 39002.5 which governs preconstruction geoligical and soil investigations of school sites. (Appendix D, App. 65.) The district court included the pendent claim in its Pretrial Order, and the state officials filed written objections which the court overruled. The issue was tried to the court as a matter of pendent jurisdiction.

The trial of all issues in the case consumed 48 court days. On the seismic safety issue, two basic claims emerged during trial: (a) that the preconstruction geological and soil engineering studies were inadequate and (b) that the site was in fact unsafe. The current chief of the Structural Safety Section of OSA testified at trial that the three studies performed at CSB fully met all requirements of California law. (RT 6100.) In addition, this witness testified that the CSB facility had been constructed in full compliance with the applicable building codes and in some respects the buildings were stronger than required. (RT 6101-6102, 6111, 6113.)

On January 19, 1982, the court orally announced its findings in favor of the state officials on all the educational issues. At that same time, the court announced its conclusions that it had federal subject matter jurisdiction over the seismic safety claims under EAHCA, § 504, and as pendent claims under California law, but that it could not decide those claims as a matter of fact. The court

thereupon reopened the evidentiary record for appointment of an expert witness to review the entire record of the court proceedings related to the seismic safety issue.

When the state officials declined to post with the court their share of the expert's estimated charges, the district court enjoined further operation of CSB until the amount was posted. (Memorandum of Decision filed August 17, 1982, Appendix C.) The state officials appealed that order, but after the United States Court of Appeals for the Ninth Circuit refused to stay the injunction, they agreed to post the required amount.

On October 28, 1982, the district court charged his expert, in part, to evaluate "the *adequacy* of the geologic, seismic and soils studies of the new site . . ." to determine if the studies were ". . . sufficient in nature, scope and extent to comport with sound professional practice for ascertaining seismic safety." (CT 208.) On November 5, 1982, the state officials filed written objections to the instructions on several grounds, including that the quoted instruction was vague as to the meaning of "seismic safety" as that term is applied to school construction by California law.

In August of 1983, the court's expert submitted his report answering the quoted instruction in the negative and recommending extensive additional geological and soil engineering studies, including an eighteen to twenty foot deep trench across the site and at least forty, seventy foot deep borings. (CT 214.)

After some further proceedings, including the district court's rejection of an offer of proof in rebuttal to

its expert, the court ordered the state officials to perform the additional studies recommended by the expert as a condition of continuing to operate CSB. (Supplemental Findings of Fact and Preliminary Injunction filed December 9, 1983, Appendix B.) The court of appeals' affirmance of that order is the subject of this Petition to this Court.[2]

The district court's jurisdiction over this cause is based upon 20 U.S.C. section 1415, 18 U.S.C. section 1343, and 29 U.S.C. section 794.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts With Decisions of This Court as to the Scope of Claims and Remedies Cognizable Under EAHCA and § 504.

A. EAHCA

EAHCA guarantees a "free, appropriate public education" for all handicapped children in states which elect to receive funds under the Act. (20 U.S.C.

---

2. Prior to its decision on the merits of the appeal, on January 18, 1984, the court of appeals denied the state officials' Emergency Motion for Stay on Appeal. Subsequently, on February 1, 1984, Justice Rehnquist denied a Motion for Stay on Appeal, and then on February 21, 1984, this Court on referral from Justice Powell likewise denied a stay. (A-602.)

On February 27, 1984, the parties stipulated, and the district court ordered, that the state officials could continue to operate CSB pending a decision from the court of appeals provided that they commence preliminary fiscal and administrative steps to perform the testing and in the event of an affirmance by the court of appeals commence testing at that time, regardless of their right to seek further review of the injunction.

§ 1401(18).) Such an education must "meet the standards of the State educational agency." *(Ibid.)*

Both the district court and the Ninth Circuit agreed that there is no reference whatsoever in either the EAHCA or its implementing regulations to seismic safety or any other kind of building codes or facility safety requirements. (Appendix A, App. 12, and Appendix C, App. 55.) Yet both courts held that such a requirement should be read into the Act. *(Ibid.)* The Ninth Circuit held that EAHCA incorporates California's seismic safety requirements for schools because the statutes in question are codified in the California Education Code. (Appendix A, App. 12.)[3]

The Ninth Circuit's decision conflicts with this Court's interpretation of the scope of the EAHCA's guarantee of a "free, appropriate public education" in *Board of Education v. Rowley,* 458 U.S. 176 (1982). In *Rowley,* this Court held that Congress had not imposed on the states an obligation to maximize each handicapped child's potential. (*Rowley, supra,* 458 U.S. at p. 198.) The Court relied on the principle that ". . . if Congress intends to impose a condition on the grant of federal moneys, it must do so *unambiguously,* as required in the valid exercise of its spending power." (*Ibid.,* fn. 26, emphasis added; cf. *Pennhurst State School v. Halderman,* 451 U.S. 1, 24 (1981), (Pennhurst I).)

This Court's recent decision in *Smith v. Robinson,* — U.S. —, 104 S.Ct. 3457, (1984) applies the same kind

---

3. The Ninth Circuit acknowledged, but dismissed as unpersuasive, the fact that the seismic safety provisions are administered and enforced not by the Department of Education but by the Office of State Architect.

of analysis of Congressional intent in construing that the remedial provisions of EAHCA preclude an award of attorney's fees to a successful litigant. Just as Congress deliberately omitted any provision for attorney's fees under EAHCA, so too Congress omitted any reference whatsoever in the Act to physical facilities, building codes, or safety requirements. Petitioners submit that Congress has left regulation of such matters to the states.

Relying on this Court's decision in *Rowley,* two circuit courts have held that EAHCA does not encompass claims that challenge a state's fiscal decisions. (*Tilton by Richards v. Jefferson County Board of Education,* 705 F.2d 800, 804 (6th Cir. 1983) cert. den. 104 S.Ct. 998 [school closure for budgetary reasons] and *Fallis v. Ambach,* 710 F.2d 49, 54 (2d Cir. 1983) [reduction in tuition rate for handicapped students in public schools].) Although budgetary decisions of this type often, if not always, affect services to handicapped children, they are matters traditionally entrusted to the states as are fire and life safety requirements, building codes, and minimum class size provisions.

B. Section 504

As interpreted by this Court, § 504 is a non-discrimination provision that is in one sense broader, but in another sense narrower, than EAHCA. (*Smith v. Robinson, supra,* 104 S.Ct. at p. 3472.) It is broader because it prohibits discrimination against handicapped persons of all ages and applies to all programs and services operated by a recipient of federal funds, but it is also narrower because by itself it does not specifically guarantee the com-

prehensive substantive and procedural rights that EAHCA expressly confers. (*Id.*, at p. 3473.)

In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), this Court held that § 504 does not require affirmative action on behalf of handicapped persons but only the absence of discrimination. (442 U.S. at 411-412.) In light of *Davis*, the lower courts have generally upheld regulations implementing § 504 so long as they do not impose extensive modification of a state's program but only such reasonable modification as will preclude discrimination. (*American Public Transit Authority v. Lewis*, 665 F.2d 1272 (D.C. Cir. 1981) [Dept. of Transportation § 504 regulations struck down as overbroad]; *Kruelle v. New Castle School Dist.* (3d Cir. 1981) [no § 504 right to residential placement for severely handicapped child]; accord *Colin K. v. Schmidt*, 715 F.2d 1 (1st Cir. 1983) and *Monahan v. State of Nebraska*, 687 F.2d 1164 (8th Cir. 1982), *cert. den.* 103 S.Ct. 1252; *New Mexico Assoc. for Retarted Children v. State of New Mexico*, 678 F.2d 847 (10th Cir. 1982) [§ 504 requires modification of existing education programs if handicapped are precluded from realizing program benefits, provided no excessive financial or administrative burden is imposed].)

There is evidence in the record, namely the testimony of Donald Jephcott, that the CSB facilities meet or in some respects exceed the requirements of state law. Mr. Jephcott is the current chief of the STRUCTURAL SAFETY OF OSA, the agency charged with enforcing California's seismic safety requirements, for school buildings. As such then Mr. Jephcott's judgment should be given great deference. (*Youngberg v. Romeo*, 457 U.S. 307, 323 (1982).) The Ninth Circuit failed to accord any particular significance to this testimony. (Appendix A, App. 18.)

Relying on a § 504 regulation that requires a recipient of federal funds, which operates a facility "identifiable as being for handicapped persons" to "ensure that the facility . . . [is] *comparable* to other facilities . . . of the recipient" (45 C.F.R. § 84.34(c), emphasis added), the Ninth Circuit held below that not only must the state officials ensure CSB is "as safe as other schools" but also they must

> " . . . make such reasonable adjustments as are necessary to make a school for blind and multi-handicapped students as safe as other California schools are for their nonhandicapped students." (Appendix A, App. 17.)

By thus requiring functional equivalency, the court of appeals has approved a standard of seismic safety for CSB far beyond "comparability," "equality of access," and "nondiscrimination." By upholding the district court's order in this proceeding, the Ninth Circuit has drawn a distinction between the even-handed treatment of all California schools under the state's seismic safety requirements and a yet undefined higher standard of seismic safety that the state officials must ensure at CSB and by extension at every other school where handicapped children are educated. Application of this "higher" standard will have disastrous consequences for public education in California and in every other state in the union where increasing numbers of handicapped children are each year being educated in the same buildings and often in the same classrooms with their nonhandicapped peers —a direct result of the mainstreaming mandate of the EAHCA. (20 U.S.C. § 1412(5) (B).)[4]

---

4. 20 U.S.C. section 1412(5)(B) provides that in order to qualify for funds under the EAHCA a state must demonstrate among other things that it has established "procedures to as-

(Continued on following page)

At this juncture the Ninth Circuit's decision mandates the expenditure of hundreds of thousands of dollars in a search for an absolute certainty about subsurface conditions at the CSB site — a search far in excess of anything mandated by California law or by those entrusted to enforce it. Although the difference between "reasonable modification" and "affirmative action" is one of degree, to require "functional equivalency" represents application of the wrong legal test in direct contravention of this Court's decision in *Davis*.

II.

The Decision Below Significantly Broadens the Scope of EAHCA and § 504, And Will Create Difficult and Recurring Problems for State and Local Education Officials, State Legislatures and the Lower Courts.

This Court has had several recent occasions to review the scope of the EAHCA both by itself (*Board of Education v. Rowley, supra*) and in relation to §504 (*Smith v. Robinson, supra*, and *Texas v. Tatro*, — U.S. —, 104 S.Ct. 3371 (1984). Nonetheless, neither this Court nor any lower court except the courts below have gone so far as to suggest that the EAHCA's guarantee of an appropriate education incorporates every statutory provision that a state's Legislature happens to codify in the state's education code. No court other than

---

(Continued from previous page)

sure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handcapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . . ." (See also 20 U.S.C. § 1414(a)(1)(c)(ii) and 34 C.F.R. § 300.550(b)(1).)

the courts below have stretched the nondiscrimination guarantee of § 504 to such a point that functional equivalency of facilities has been mandated.

If the Ninth Circuit's decision stands as to the scope of EAHCA, a myriad of purely local matters of educational policy and procedure will be subject to oversight by the federal courts. Such things as the physical dimensions of classrooms, the color of the paint on the walls, the number and size of windows, the placement and spacing of fire escapes and sprinkler systems, the number of students in a class, the length of time children may travel on buses going to and from school, the placement of schools near airports or industrial complexes, the requirements for advancement from grade to grade or for graduation, the minimum qualifications and credentialing standards for teachers — all these and more would be subject to litigation under the EAHCA.

Such a result is inimical to Congress' intent in providing federal funds through the EAHCA to assist the states in educating handicapped children. As reiterated by this Court in *Smith v. Robinson, supra,* by enacting the EAHCA Congress intended "to relieve the fiscal burden placed on the states and localities by their responsibility to provide education for all handicapped children." (*Smith v. Robinson, supra,* 104 S.Ct. at p. 3468.) It was to this same end that Congress created the EAHCA as the exclusive vehicle for pursuing a claim that an educational agency failed to provide a free appropriate education but precluded a successful plaintiff from receiving an award of attorney's fees. *(Smith v. Robinson, supra,* 104 S.Ct. at p. 3470.)

If the term "standards of the State educational agency" as used in the definition of a free, appropriate, public education means anything and everything that

has a colorable connection to a state's educational policies and procedures, then the EAHCA imposes tremendous financial and administrative burdens upon the states. Congress certainly did not intend this result. This Court should grant the writ to prevent the Ninth Circuit's decision from wreaking havoc with the purposes and intent of the EAHCA.

Similarly, by enacting § 504, Congress did not intend to mandate that all programs, services and facilities for handicapped persons be functionally equivalent to programs, services and facilities for the nonhandicapped. Yet the Ninth Circuit's decision mandates the state officials herein to ensure that CSB, and by extension every other school that serves at least one handicapped student, be functionally equivalent to schools for the nonhandicapped.

While it is true that only handicapped students attend CSB, very few schools in California or elsewhere exclusively serve nonhandicapped students. Must each school that has one or more handicapped students be made functionally equivalent to those few, if any, schools that by happenstance do not serve any handicapped students? And what happens when a school without any handicapped students accepts such a student; does the entire school facility and program have to be modified then to achieve functional equivalency? Although the admission of one or even ten or twenty handicapped students may not require that *all* the classrooms and restrooms, as well as the cafeteria and the playground, be made accessible by wheelchair, would not such a school be obligated to perform additional geological and soil engineering studies, flood and tornado studies, fire safety studies, structural inspections, or whatever else might be required by state or local building codes, to

ensure functional equivalency? The Ninth Circuit's decision raises all these troubling questions and more. Additionally, the decision sets up the federal district courts as the interpreter of all sorts of state and local statutes and ordinances to which the standard of functional equivalency must be applied. In few instances will the state's own courts have previously construed these provisions.

It is just this kind of federal judicial involvement in matters of state and local policy which this Court has instructed the lower courts to avoid. In *Pennhurst State School v. Halderman*, — U.S. —, 104 S.Ct. 900 (1984) (Pennhurst II), this Court determined that the Eleventh Amendment precludes the federal courts from telling the state or its officials how to conform their conduct to state law. (*Pennhurst, supra*, 104 S.Ct. at p. 911.) The Ninth Circuit in the guise of enforcing the EAHCA and § 504 has instructed the state officials herein to do substantially more than state law would otherwise require them to do. As both the Ninth Circuit and the district court acknowledged, the only substantive requirements for seismic safety of schools are found in California law.

The trial of the seismic safety issues was had under the aegis of pendent jurisdiction. It was only long after trial that the district court abandoned pendent jurisdiction and rested its jurisdiction exclusively on the EAHCA and § 504. Although this judicial bootstrapping avoids a direct conflict between the holding below in this case and this Court's decision in *Pennhurst II*, it hardly bespeaks of that judicial restraint and circumspection this Court requires of the lower courts.

The state officials concede that as to claims that arise directly out of disputes about the educational placement of handicapped children or about their education or related services, the state has waived its immunity by

accepting funds under EAHCA. Similarly, with regard to claims of discrimination and preclusion of the handicapped from facilities, programs and services under § 504, the state officials have similarly waived their constitutional immunity. But as to claims that they have violated the provisions of California law governing seismic safety of schools, there has not been, and there could not be, any actual or even constructive waiver of immunity.

III.

This Court Should Grant the Writ Even Though the District Court's Order is Styled as a Preliminary Injunction and the State Officials are Complying With its Terms.

The state officials acknowledge this Court's usual reluctance to review interlocutory, non-final orders or orders which have become moot by voluntary compliance. The Ninth Circuit itself refused to reach the merits of the controversey because it considered the district court's decision interlocutory only. (Appendix A, App. 6.) This conclusion was erroneous, because the district court has finally and conclusively determined that the CSB students' twin claims of inadequate testing and unsafe facilities are cognizable under both EAHCA and § 504. These conclusions—bolstered though not definitely affirmed by the Ninth Circuit—will control all further proceedings in this case.

Moreover, the district court has finally and conclusively determined one of the CSB students' factual claims that

the previous testing at the site was inadequate. The Ninth Circuit's conclusion that this determination is not clearly erroneous effectively precludes any review at a later time, since review of findings of fact after final judgment is had upon the same standard.

Finally, although by the time this Court considers the instant petition, the state officials may well have already complied with the injunction, this Court should not deny the writ on that basis. The cause will not necessarily be concluded after the state officials have expended several hundreds of thousands of dollars on trenches and borings. There is nothing to prevent the district court under the aegis of EAHCA or § 504 or both from ordering the state officials to perform yet further testing or to make major structural changes in the buildings, or even to close some or all of CSB. Thus, the controlling questions of law that underpin the injunction should be reviewed and corrected by this Court at this juncture rather than allowing the lower courts foray into matters of traditionally local concern and regulation to continue.

———o———

CONCLUSION

For all of the above-stated reasons, this Court should issue a writ of Certiorari to review the decision of the Ninth Circuit.

JOHN K. VAN DE KAMP, Attorney
General of the State of California

THOMAS E. WARRINER
Assistant Attorney General

MARGARET A. RODDA
DENNIS ECKHART*
Deputy Attorneys General

THOMAS K. MCGUIRE
Attorney at Law

1515 "K" Street, Suite 511
Sacramento, California 95814
Telephone: (916) 324-5348

Attorneys for Petitioners

*Counsel of Record/Member Supreme Court Bar

APPENDIX A

No. 84-1506
D.C. No. C-80-473-MLS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STUDENTS OF CALIFORNIA SCHOOL FOR THE BLIND, et al.,

Plaintiffs-Appellees,

vs.

BILL HONIG, in his capacity as Superintendent of Public Instruction of the State of California, et al.,

Defendants-Appellants.

OPINION

(Filed June 20, 1984)

On Appeal from the United States District Court
for the Eastern District of California
Hon. Milton L. Schwartz, Judge Presiding
Argued and Submitted May 16, 1984

Before: CHOY, PREGERSON, and REINHARDT, Circuit Judges.

PREGERSON, Circuit Judge.

This law suit concerns the seismic safety of the new Fremont campus of the California School for the Blind. The testimony of a court-appointed expert convinced the district court that additional tests were needed to determine the seismic safety of the Fremont School. The court entered a preliminary injunction ordering the state defendants to perform the additional tests or to close the school. We affirm.

I. *Statement of Facts*

This litigation arose when the California Department of Education decided to move its residential school for the blind from Berkeley to Fremont. The students sought to block the move. In June 1980, they brought suit in federal court against California educational authorities under the Education for All Handicapped Children Act of 1975 (codified at 20 U.S.C. §§ 1232, 1401, 1405, 1406, 1411-1420 and 1453 (1983)), § 504 of the Rehabilitation Act of 1973 (codified at 29 U.S.C. § 794 (1982)), and 42 U.S.C. § 1983. The students challenged the move on a procedural ground, alleging that the state defendants failed to give proper notice of a change in the students' educational placement. The students also challenged the move on the substantive grounds that the facilities and community in Fremont were inappropriate for education of the blind. Among the many reasons against the move set out in the complaint were allegations that the Fremont site was an earthquake-prone, dangerous area.

In August 1980, the district court certified a plaintiff class of all present and future students at the school and their parents and guardians. The district court temporarily enjoined the move to Fremont pending formal notice to each parent or guardian and a hearing for those requesting it. Some parents objected to the possibility that no special school for the blind would be available if the Fremont move was blocked. The district court later modified its order and allowed the school to open.

The seismic safety claims became a major focus of the law suit at the pretrial stage. In the pretrial order,

the students claimed for the first time that the state defendants had violated California Education Code provisions relating to the seismic safety of school sites. The students urged the court to exercise pendent jurisdiction over state law seismic safety claims. The state defendants argued that pendent jurisdiction was inappropriate because the seismic claims had no common nucleus of operative fact with the educational challenges to relocating the school. The district court did not decide to entertain the seismic safety claims until the trial was underway. When the court announced its decision to hear the claims, it failed to specify whether it would consider the claims under federal question jurisdiction or as pendent state law claims.

The trial began on March 31, 1981 and consumed 48 court days. Many experts testified on the seismic safety issues, and their testimony was highly contradictory. On January 19, 1982 the court orally announced a decision. The court found in favor of the state defendants on the claims relating to the quality of education at the new Fremont campus. The court also found that it was unable to decide the seismic safety claims on the basis of evidence presented at trial. The court then sua sponte reopened the case and stated its intention to appoint a neutral expert to determine whether the state defendants had adequately tested the Fremont campus for seismic safety. The court ultimately selected Dr. Richard Jahns, former Dean of Stanford University's Earth Sciences Department, to serve as the neutral expert.

The state defendants objected to the reopening procedure, to the court's choice of expert, and to the way the court instructed the expert. The state defendants re-

fused to post its (sic) half of the expert's fee, which caused the district court to enter a preliminary injunction preventing the state defendants from using the Fremont campus until the money was posted. The state defendants appealed to this court, and asked for a stay of the injunction pending appeal. This court denied the stay, and the state defendants withdrew the appeal and posted the money.

When his study was completed, Dr. Jahns testified that the seismic studies of the site were inadequate because they did not provide enough information to evaluate the school's physical safety. The state defendants then made an offer of proof to rebut Dr. Jahns' testimony, but the district court rejected the offer as untimely. The court entered findings of fact and conclusions of law which found that California's pre-construction seismic safety investigation was inadequate. The court then issued a preliminary injunction ordering the state defendants to conduct additional geological tests (under the supervision of Dr. Jahns as special master) or to close the Fremont campus. The tests will cost about $200,000.

The state defendants brought this appeal under 28 U.S.C. § 1292(a)(1) (1982). They applied to this court for a stay of the district court's order pending appeal, which we denied. The Supreme Court also refused to stay the district court's order requesting additional geological tests. The parties joined in a motion to expedite the appeal which we granted.

On this appeal, the state defendants argue that:

(1) the preliminary injunction violates the Eleventh Amendment;

(2) the students' seismic safety claims are not cognizable under federal law;

(3) the district court's finding that seismic testing of the Fremont site was inadequate is clearly erroneous; and

(4) the district court abused its discretion in reopening the case, appointing a neutral expert, and rejecting the state defendants' offer of proof in rebuttal.

II. *Standard of Review*

Our standard of review depends on whether the district court's order should be characterized as a preliminary or as a permanent injunction. The court styled its order as a preliminary injunction, an intermediate step to an ultimate determination whether the Fremont campus is either seismically safe or unsafe. The state defendants argue that the district court's injunction is an interlocutory, but permanent, injunction that requires a more exacting review than that accorded a preliminary injunction. *See, e.g., Smith v. Vulcan Iron Works,* 165 U.S. 518 (1897).

In *Smith,* the trial court had made a final determination on the merits in awarding injunctive relief, and all that remained for the court to do was to calculate damages. This case is distinguishable. The essence of the district court's order is preliminary, not final. The order prevents the state defendants from using the Fremont campus unless certain geological tests are performed. The tests will determine once and for all whether the campus is seismically safe. The liability of the state defendants will not be finally decided unless and until the tests are performed.

Because we conclude that the order on appeal is a preliminary injunction, our review is necessarily abbreviated. "A court of appeals, like a district court, is not required to resolve doubtful or difficult questions of law at this preliminary stage." *Lopez v. Heckler,* 725 F.2d 1489, 1498 (9th Cir. 1984), *partial stay granted, Heckler v. Lopez,* 83-6126, — U.S. — (April 30, 1984). We will reverse the district court only if we find that it abused its discretion in granting the preliminary injunction. Abuse of discretion is shown if "the district court's decision was based on an error of law or on a clearly erroneous finding of fact." *Lopez v. Heckler,* 725 F.2d at 1497 (citations omitted).

III. *The Standard for Granting a Preliminary Injunction*

We note as a threshold matter that the district court applied the proper legal standard for granting a preliminary injunction. In its Memorandum of Decision filed August 17, 1982, the district court found that the appellants' contentions raised serious questions regarding the seismic safety of the Fremont facility and that the dangers to the students if they remained at the facility decidedly outweighed the hardships the state defendants would sustain if additional seismic tests were ordered. In this circuit, a preliminary injunction is properly granted if the moving party has demonstrated "*either* a combination of probable success on the merits and a possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the moving party's favor." *Beltran v. Myers,* 677 F.2d 1317, 1320 (9th Cir. 1982) (emphasis in original). The "balance of hardships" is a critical element in

justifying a preliminary injunction, and the public interest is also an important factor strongly to be considered. *See Lopez v. Heckler,* 725 F.2d at 1498 (citing extensive authority).

In the instant case, the state defendants do not argue that the balance of hardships fails to tip sharply in favor of the appellants or that the preliminary injunction is not in the public interest. The tests ordered by the district court will cost the state approximately $200,000. Weighed against that relatively small sum is potentially the safety of blind and multi-handicapped students. We agree with the district court that under the circumstances the balance of hardships tips sharply in favor of the handicapped students.

The state defendants' arguments in opposition to the preliminary injunction are directed to the legal and factual merits of the case. Our task is, therefore, to review the district court's conclusion that the students demonstrated probable success on the merits or, in the alternative formulation, that the students raised serious legal questions. *Beltran,* 677 F.2d at 1320.

IV. *The Eleventh Amendment Question*

The state defendants argue that the preliminary injunction is barred by the Eleventh Amendment. The state defendants rely on *Pennhurst State School and Hospital v. Halderman,* — U.S. —, 104 S. Ct. 900, 911 (1984) (*Pennhurst II),* a recent Supreme Court decision holding that the Eleventh Amendment bars injunctions ordering state officials to conform their conduct to state law. In *Pennhurst II,* the Supreme Court said, "it is difficult to think

of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Id.*

Pennhurst II, however, is inapplicable here. The district court did not order the state defendants to conform their conduct to state law, but to abide by federal statutes,[1] which incorporate certain aspects of state law.

The Supreme Court's actual disposition of the *Pennhurst II* case proves its inapplicability to the instant case. The Court reversed the Third Circuit's decision only inasmuch as it upheld the injunction on the basis of state law. The Court remanded the case to the Third Circuit for a determination whether the injunction could be sustained under the Eighth and Fourteenth Amendments as well as under one of the federal statutes at issue in this case, § 504 of the Rehabilitation Act of 1973. The framing of the remand indicates that the Supreme Court believed the Eleventh Amendment was a bar only to an injunction based on state law. Here we must determine whether the preliminary injunction can be sustained not on the basis of state law, but under § 504 of the Rehabilitation Act or

---

[1] Early in the case, the district court stated that it was entertaining the seismic safety claims on the basis of pendant jurisdiction. Later, the court said that it had both federal question and pendent jurisdiction. In its latest statement, the district court found that any relief under state law would be the same as under federal law, and based on its holding on federal law alone. The state defendants agree that "in the final anlysis" the district court was not relying on pendent jurisdiction, but was entertaining the seismic safety claims as arising under two federal statutes.

under the Education for All Handicapped Children's Act (EAHCA). Under both federal statutes, California waived its Eleventh Amendment immunity by participating in federally funded and regulated programs.

This court has previously decided that a state waives its Eleventh Amendment immunity under EAHCA by participating in a federally funded and regulated program to provide special educational programs for handicapped children. *Dept. of Education, State of Hawaii v. Katherine D.*, 727 F.2d 809, 818-19 (9th Cir. 1983).[2] In *Katherine D.*, we noted that the Supreme Court has said that it

> will find waiver only where stated by "the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

Katherine D., 727 F.2d at 819 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). We then indicated that Eleventh Amendment immunity will be waived in connection with particular legislation when (1) Congress has authorized suit against a class of defendants that include states, and (2) the state enters into an activity regulated by federal statute. *Katherine D.*, 727 F.2d at 819 (quoting *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1283 (9th Cir. 1979)). Applying the *Mills Music* test, we found first that in enacting EAHCA, Congress authorized suits against a class of defendants that include states—private actions under EACHA (sic) are inevitably against state agencies. We also held that the second prong of the test was satis-

---

[2] A petition for rehearing and suggestion for rehearing en banc are pending, but involve issues not relevant to this case.

fied; by receiving funds under EAHCA, a state voluntarily enters into an activity regulated by federal law.

This court also recently held that states' Eleventh Amendment immunity is waived under § 504 of the Rehabilitation Act, *Scanlon v. Atascadero State Hospital,* No. 80-5201 (June 13, 1984). Section 504 provides that no otherwise qualified handicapped individual shall be subject to discrimination under any program or activity receiving federal financial assistance. 29 U.S.C. § 794 (1982). In *Scanlon,* we held that § 504 is an enactment pursuant to section 5 of the Fourteenth Amendment which "'by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities,' and the 'State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.'" *Scanlon,* slip op. at 4.

Applying the *Mills Music* two-pronged test to evaluate § 504, once again we see that (1) Congress has authorized private suits against a class of defendants that inevitably includes states, and (2) by accepting federal funds, the states have entered into activities regulated by federal law. Thus, the Eleventh Amendment is not a barrier to suits against states under either § 504 or EAHCA.

V. *Cognizability of Seismic Safety Claims Under Federal Law*

We must now determine whether the seismic safety claims are cognizable under federal law. The students base their claims on two federal statutes: EAHCA, which

provides funds to states for the education of handicapped children with certain conditions attached, and § 504, which bars discrimination against the handicapped in federally-funded programs. These federal statutes urged by the students as a basis of jurisdiction make no specific mention of seismic safety. Our subject matter jurisdiction hinges on whether these statutes can be interpreted to regulate seismic safety of schools for the handicapped either directly or by the adoption of state law. In the discussion that follows, we analyze each statute in turn.

A. *The Education of All Handicappel Children Act of 1975*

EAHCA provides federal funds to assist state agencies in educating handicapped children. EAHCA conditions funding on the state's compliance with a variety of regulations and procedures. The state may qualify for federal assistance only if it "has in effect a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1). The term "free appropriate public education" is defined in 20 U.S.C. § 1401(18).

> "The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under the public supervision and direction, and without charge, (B) *meet the standards of the State Educational Agency,* (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a) (5) of this title.

(Emphasis added.)

The definition of "free appropriate public education" says nothing about the seismic safety of physical structures; the emphasis is on services. "Free appropriate public education" means special education and related services. . . ." 20 U.S.C. § 1401(18). "Special education" means "specially designed instruction . . . to meet the unique needs of a handicapped child. . . ." 20 U.S.C. § 1401(16). "Related services" refers to transportation, speech, physical and occupational therapy, recreation, transportation, and medical and counseling services. 20 U.S.C. § 1401(17) Thus, there is no explicit coverage of the students' plaintiffs' seismic safety claims in EAHCA.

We find, however, that the statutory definition of "free appropriate public education" supports the students' position. 20 U.S.C. § 1401 (18) (B) provides that a free appropriate public education is one that "meet[s] the standards of the State educational agency." EAHCA thus incorporates state educational standards. The students correctly point out that EAHCA does not specifically provide for textbooks, writing materials or appropriately trained teachers, but EAHCA incorporates the state standards that provides those items. We note that California law requires seismic safety of schools. *See* Cal. Educ. Code §§ 39002, 39002.5 (West 1978 and Supp. 1984). In light of specific provisions for seismic safety in the California Education Code, there is a strong argument that a seismically unsafe school would not meet the standards of the state educational agency, and thus, would not be part of an appropriate public education under EAHCA.

The state defendants argue first that seismic safety is not a "standard of the state educational agency" within the

meaning of 20 U.S.C. § 1401(18)(B), but rather relates to non-educational standards imposed by the "office of the state architect." This argument is not persuasive in light of the fact that there are seismic safety standards relating directly to schools that are codified as part of the California Education Code.

The state defendants' second argument is based in a footnote on the only Supreme Court case construing EAHCA, *Board of Education v. Rowley,* 458 U.S. 176 (1982). In the footnote, Justice Rehnquist observes that the legitimacy of Congress' authority under the spending power to legislate vis-a-vis the states rests on whether a state knowingly and voluntarily accepts conditions set forth in the federal statute. "Accordingly if Congress intends to impose a condition on a grant of federal monies, it must do so unambiguously." *Id.* at 204 n.26 (quoting *Pennhurst State school and Hospital v. Halderman,* 451 U.S. 1, 17 (1981) (*Pennhurst I*)). The state defendants argue that regulation of seismic safety is not clear or unambiguous under EAHCA. It is clear, however, that EAHCA "both funds and regulates states' assistance to handicapped students." *Department of Education, State of Hawaii v. Katherine D.,* 727 F.2d 809, 813 (1983) (citations omitted) (emphasis added). While the statute does not unambiguously place conditions relating to seismic safety of schools on states accepting funds, it expressly provides that an appropriate education meets the standards of the State educational agency. California knew when it accepted federal monies for programs funded under EAHCA that it would have to meet the standards established by its educational agency, and that those standards emcompassed (sic) seismic safety of school sites.

This court has previously found that physical safety is part of an appropriate education under EAHCA. *See Mountain View-Los Altos Union High School District v. Sharron B. H.*, 709 F.2d 28, 30 (9th Cir. 1983) (holding that parent cannot unilaterally transfer child to private school and seek reimbursement of tuition under EAHCA except where transfer is justified by a threat to child's physical health); *Dept. of Education, State of Hawaii v. Katherine D.*, 727 F.2d at 821 (educational plan involving risk to child's life cannot be considered appropriate education under EAHCA) (Reinhardt, J., dissenting in part). *See also Anderson v. Thompson*, 658 F.2d 1205, 1213-14 (7th Cir. 1981) (Congress could not have intended a child to remain in an educational placement where there is a serious risk of injury to the child's physical health). Although these cases are not directly on point because they involve reimbursement for safer alternatives to placement in public schools, they illustrate that physical safety, not surprisingly, is considered an element of an appropriate education.

In short, although EAHCA does not expressly provide for seismic safety, there is a strong argument that it incorporates state law seismic safety standards. Moreover, physical safety is considered part of the appropriate public education guaranteed by EAHCA. Thus, while we need not finally decide this jurisdictional issue, *Lopez v. Heckler*, 725 F.2d at 1498-99, we find that the students have raised serious legal questions and are likely to succeed on the merits.

B. *Section 504*

The district court also based subject matter jurisdiction on § 504 of the Rehabilitation Act of 1973, which provides:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial asssitance.

29 U.S.C. § 794 (1982).

The state defendants argue that the main thrust of § 504 is to provide equal access to state rehabilitation and employment programs receiving federal funds, not to provide any substantive safety standards. As the students point out, however, § 504 not only guarantees participation and access to programs, but also prohibits discrimination under any program receiving federal financial assistance. Here, they argue, the state school for the blind is less safe than other schools, and thus, California discriminates against the handicapped in a fashion prohibited by § 504.

A regulation promulgated by the Department of Health and Human Services pursuant to § 504 entitled "Educational Setting" is directly on point. The regulation specifically provides that facilities for the handicapped shall be comparable to other facilities.

> *Comparable facilities.* If a recipient, in compliance with paragraph (a) of this section operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

45 C.F.R. § 84.34(c).

The state defendants argue that 45 C.F.R. § 84.34(c) is invalid because it exceeds the scope of statutory authority.

We disagree, and find that § 84.34(c) is a valid interpretation of § 504. The interpretation of a statute by the administrative agency charged with its construction is entitled to great deference. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Where an agency is entrusted with the primary task of defining statutory language, a review of the validity of a regulation promulgated under the statute is limited to determining whether the regulation is reasonably related to the purposes of the enabling legislation. *Mourning v. Family Publications Service Inc.*, 411 U.S. 356, 369 (1973). Because § 504 forbids discrimination in federally funded programs, a regulation requiring comparable facilities seems to be a logical and valid interpretation of that statute.

The state defendants also argue that the students' interpretation of § 504 requires affirmative action which would be contrary to the scope of § 504 as construed in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). This argument misses the mark. The students' contention is that the Fremont campus was not as adequately tested as other school facilities in California, not that any affirmative action is required. Second, *Davis* did not hold that states are not required to make reasonable accommodations to avoid discrimination against the handicapped. The court said:

> If these regulations were to require substantial adjustments in existing programs *beyond those necessary to eliminate discrimination against otherwise qualified individuals* . . . they would constitute an unauthorized extension of the obligations imposed by that statute.

Id. at 410 (emphasis added). We believe this language at a minimum means states must make reasonable accomoda-

tions to avoid discrimination against handicapped individuals. In the context of this case, the state is required to make the school for the blind as safe as other schools. In addition, we believe that the state is also required to make such reasonable adjustments as are necessary to make a school for blind and multi-handicapped students as safe as other California schools are for their nonhandicapped students. Such adjustments are "necessary to eliminate discrimination against otherwise qualified individuals." The students produced expert witnesses who testified that seismic problems with the Fremont site would pose a serious hazard in a normal school but a "super serious" hazard to a school of multi-handicapped children.

Finally, the state defendants argue that the general anti-discrimination provisions of § 504 cannot be used to make an end run around the more specific provisions of EAHCA, citing *Dept. of Education, State of Hawaii v. Katherine D.*, 727 F.2d 809, 820-21 (9th Cir. 1983) (holding that comprehensive remedial provisions of EAHCA prevented handicapped students from recovering attorneys' fees under the Rehabilitation Act, 29 U.S.C. § 794(a)(b)).

Katherine D. involved a claim addressed squarely and in detail by EAHCA. We held that the plaintiff's claim was therefore not cognizable under the Rehabilitation Act. In the instant case, § 504, and particularly the regulation set out at 45 C.F.R. § 84.34(c), seem to be at least as directly related to the issues involved as anything in EAHCA. While EAHCA is more specific than the Rehabilitation Act as to educational programs, the Rehabilitation Act is more specific as to physical facilities. Thus, although we have concluded that plaintiffs present serious legal questions regarding whether EAHCA provides them a remedy, we

also think that they have presented a serious question as to the availability of relief under the Rehabilitation Act.

VI. *The District Court's finding of Inadequate Seismic Testing is Not Clearly Erroneous*

We noted earlier that we will reverse a district court's decision regarding a preliminary injunction if the decision was based on "clearly erroneous findings of fact." *Lopez v. Heckler,* 725 F.2d at 1497 (citations omitted). The district court found that seismic testing at the Fremont site was inadequate. That finding is not clearly erroneous.

A witness for the state defendants, Donald Jephcott, testified that his independent review of pre- and post-acquisition geotechnical and soil studies led him to conclude that the reports were adequate to meet state law requirements. The several experts that testified on behalf of the students (and a court-appointed neutral expert) contradicted Jephcott, testifying that seismic testing was inadequate.

The evidence at trial showed that a total of three seismic studies of the site were done. The first test was done by the California Department of Mining and Geology. That study included no physical examination of the site. It was based on historical evidence about earthquakes and studies done on nearby construction sites. The students' experts testified that this study was a mere review of the literature.

The second study was done by Woodward-Lundgren & Associates. That test did involve some borings and test pits, but the students pesented evidence that the borings and pits were not adequate to make a study of the 90-acre

site. The students also presented evidence that the Woodward-Lundgren study was preliminary in nature, and in fact recommended additional studies to determine liquefaction potential.[3] Plaintiffs' experts also testified that the study understated the potential for liquefaction.

The third study was performed by Caltrans. The Caltrans study included quite a few borings, but the students' experts testified that for the most part these borings were too shallow. The Caltrans study followed up on the possibility of a fault[4] on the site, originally suggested in the Department of Mining and Geology study. Three out of four fault testing techniques used by Caltrans suggested the presence of a fault. On the basis of these results, Caltrans recommended further tests, including trenching, yet trenching was never done.

In short, the students' experts testified, and the court-appointed neutral expert concurred, that the three seismic investigations performed, taken together or separately, were inadequate to determine seismic hazards at the Fremont site. The court-appointed expert recommended trenching to determine both the possibility of surface fault-

---

[3] Liquefaction occurs when shaking by an earthquake causes masses of fine subsurface sand and gravel to lose strength and cohesiveness. As a result, the suburface loses its capability to bear the weight of the surface, and the surface settles. Depending upon the magnitude of settlement, buildings can crack and tilt and gas and water lines can rupture.

[4] A fault is a fracture in the earth's crust which, during an earthquake, can shift either horizontally or vertically. California law prohibits locating a school on the trace of an active fault. Cal. Educ. Code § 39002.5 (West 1978 Supp. 1984). The Fremont campus is located one-half mile from a major fault called the Hayward Fault. Moreover, a masters thesis done at Berkeley in 1938 projected a fault trace running right through the Fremont school site.

ing and ground rupture due to liquefaction. The state's own study by Caltrans recommended the same program. Dr. Jahns, the court-appointed expert, also recommended "many more moderately deep exploratory borings than have been developed to date." Such exploratory borings would indicate the presence of masses of sand and fine gravel with the potential for liquefaction during an earthquake.

In view of the fact that two of the three seismic studies were clearly preliminary in nature, and the fact that the third study made recommendations for further testing that were never accomplished, we conclude that the district court's finding of fact that the seismic tests were inadequate are not clearly erroneous.

VII. *The District Court's Use of a Court-Appointed Expert*

After a lengthy trial and much conflicting expert testimony, the judge could not decide the merits of the students' seismic safety claims on the basis of evidence presented at trial, so he reopened the case and appointed a neutral expert to evaluate the adequacy of seismic testing at the Fremont site. The state defendants have several objections to this procedure on this appeal, all of which we find unpersuasive.

A. *Reopening the Case*

The state defendants object to the district court's sua sponte reopening the case to obtain evidence from a neutral expert. Sua sponte reopening is an unusual procedure, but it is within the discretion of the trial court. *See Calage v. University of Tennessee,* 544 F.2d 297, 302 (6th Cir. 1976)

(district court did not abuse its discretion in sua sponte reopening sex discrimination case for additional evidence to explain wage differentials); *Arthur Murray, Inc. v. Oliver,* 364 F.2d 28, 34 (8th Cir. 1966) (district court abused discretion in sua spone reopening antitrust case for additional evidence on lost profits where there was sufficient evidence in the record and no exceptional circumstances).

The court's discretion was not abused here. Both *Calage* and *Arthur Murray* emphasize that "such evidence as a judge may properly seek to have added to a record on his own motion should appear both to be important as a matter of preventing injustice and to be reasonably available." *Calage,* 544 F.2d at 302 (citing *Arthur Murray,* 364 F.2d at 34). The district court specifically found reopening was necessary to prevent injustice and that the evidence was reasonably available. Only one additional expert testified, and his testimony was based primarily on the existing trial record. Although the procedure is somewhat unusual, the circumstances of the case appear to justify it.

B. *Rule 706*

The district court expressly relied on Rule 706, Fed. R. Evid. as a source of power to appoint a neutral expert. Rule 706 allows the court to appoint a neutral expert on its own motion, whether or not the expert is agreed upon by the parties. Rule 706 also allows the court to assess the cost of the expert's compensation as it deems appropriate. Appointments under Rule 706 are reviewable only for abuse of discretion. *See Fugitt v. Jones,* 549 F.2d 1001, 1006 (5th Cir. 1977). As required by Rule 706, the judge allowed both parties to thoroughly cross-examine its appointed expert. Thus, under Rule 706, the district court's appointment of a neutral expert was proper.

The state defendants argue that the district court treated the neutral expert, Dr. Jahns, not as a neutral expert, but as a special master. Appointments of special masters are subject to stricter standards of review than appointments of neutral experts under Rule 706. Rule 53, Fed. R. Civ. P. governs the appointment of special masters. Rule 53(b) provides, "A reference to a master shall be the exception and not the rule." The court in *Arthur Murray, supra,* used the lack of an "exceptional condition" as grounds for reversing the appointment of a special master in an antitrust case.

Here, the district court first appointed Dr. Jahns expressly as a court-appointed neutral expert under Rule 706. He was not appointed a special master until later. After his testimony convinced the court to order additional testing, Dr. Jahns was appointed special master to oversee the court-ordered tests. The state defendants argue, however, that his role was akin to that of a special master throughout the proceeding, because the district court relied upon him so heavily. The argument is not persuasive. Even if Jahns is characterized as a special master from the time of his original appointment, the case is complex enough to fit the exceptional circumstances requirement of Rule 53(b).

C. *Dr. Jahns's Qualifications*

The state defendants contend that Dr. Jahns was unqualified. They argue that Jahns was not experienced in investigating school sites, that he was not familiar with California law regulating the siting of schools in seismically dangerous areas, and that he was not an expert on the effects of liquefaction, a potential seismic problem at the

Fremont site. The students argue that Dr. Jahns was well-qualified, pointing out that Jahns was formerly dean of Stanford's Earth Sciences Department, and had extensive experience doing seismic safety evaluations for such critical facilities as nuclear power plants and hydroelectric dams. They also point out that Jahns was somewhat familiar with school sites, having reviewed at least ten school site investigations within the past five years, and that he generally understood seismic safety standards applicable to school sites under California law.

We find the attack on Jahns' qualifications without merit. Under Rule 706, the court is free to appoint an expert of its own choosing without the consent of either party. Moreover, the question of whether an expert is qualified rests within the sound discretion of the trial judge. J. Weinstein & M. Berger, 3 *Weinstein's Evidence* ¶ 702[04] at 702-22 (1982). Nothing indicates that the trial court abused its discretion in selecting the qualified expert here.

D. *Rejection of State's Rebuttal Evidence*

The state defendants desired to make an offer of proof in rebuttal to Dr. Jahns's testimony. The district court refused to consider the offer of proof because it was untimely. The state defendants were originally ordered to submit their offer of proof by September 26. Later, the court gave the state defendants an extension stretching until 15 days after Dr. Jahns testified. At the end of the 15-day period, the state defendants requested an additional four-week extension which was refused. Decisions relating to additional time for presenting evidence are within the sound discretion of the trial court. *Gilbert v. Lachapelle,* 127 F.2d 750, 751 (D.C. Cir. 1942).

Moreover, although the state defendants characterize the proferred testimony as "previously unavailable comparative analysis of liquefaction phenomena," the proferred testimony was from an expert who had already testified at trial and may have been somewhat cumulative. In sum, the district court did not abuse its discretion in rejecting the state defendants' offer of proof.

VIII. *Conclusion*

Having reviewed all the contentions presented by the state defendants, we conclude that the students have shown probable success on the merits. In addition, the balance of hardships tips sharply in their favor. We therefore affirm the district court's preliminary injunction.

We accepted this appeal on an expedited basis. We understand that the geological tests must be performed as soon as possible before the rainy season begins. In light of this urgency, no petition for rehearing will be entertained. The mandate will issue immediately.

AFFIRMED.

APPENDIX B

CIVIL NO. S-80-473 MLS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

STUDENTS OF THE CALIFORNIA
SCHOOL FOR THE BLIND, et al.,

Plaintiffs,

vs.

BILL HONIG,[1] et al.,

Defendants.

SUPPLEMENTAL FINDINGS OF FACT
AND
PRELIMINARY INJUNCTION

(Filed December 9, 1983)

On August 17, 1982, the court issued a "Memorandum of Decision," including partial findings of fact and conclusions of law, in which it specifically declined to make findings on those questions pertaining to the seismic safety of the newly constructed site and facilities for the California School for the Blind ("CSB") at Fremont, California ("the Fremont Campus"). *See* Memorandum of Decision, dated August 17, 1982, p. 23, paragraph 7. Specifically the court stated:

---

[1] Bill Honig is substituted as a matter of course for Wilson Riles under Fed. R. Civ. P. 25(d).

The following facts cannot yet be determined:

A. Whether defendants failed to perform an adequate investigation of the seismic safety of the Fremont Campus site prior to construction thereon;

B. Whether defendants failed to adequately review prior to construction such seismic safety investigation as was performed;

C. Whether defendants failed to properly inspect the construction work in the course of construction;

D. Whether defendants employed less rigorous seismic standards and criteria for the Fremont Campus than they impose on local school districts in their site selection and construction;

E. Whether the Fremont Campus is (i) seismically safe, (ii) as safe as other public schools in California, or (iii) as safe for the multiply handicapped students at CSB as other California public schools are for their nonhandicapped children.

The court enunciated in the following language the reason for its then inability to make such findings:

(1) That were it not for the still unanswered question of seismic safety, the court would have found that plaintiffs had failed to sustain their burden of proving the Fremont Campus does not and cannot provide an appropriate education to the members of the plaintiff class;

(2) That the evidence introduced by plaintiffs has raised serious questions in the court's mind as to the seismic safety of the Fremont Campus, but that because of the present state of incompleteness of such evidence the court is unable to resolve in its own mind whether plaintiffs have or have not satisfied their burden of proof;

(3) That responsibility for this incompleteness of the evidence cannot be attributed to plaintiffs for

the reason that they had no control over or access to the Fremont Campus for purposes of geologic and seismic testing; that substantial additional data can be produced, with the cooperation of defendants, to provide the court with sufficient evidence upon which to base an objective determination of whether plaintiffs have satisfied their burden;

(4) That by reason of the foregoing, the court would exercise its discretionary authority to *sua sponte* reopen the case to take additional evidence on the issue of seismic safety, *see Thomas v. SS Santa Mercedes,* 572 F.2d 1331 (9th Cir. 1978); *Calage v. University of Tennessee,* 544 F.2d 297 (6th Cir. 1976); *Arthur Murray, Inc. v. Oliver,* 364 F.2d 28 (8th Cir. 1966), and that it would exercise its further discretion in this regard by appointing its own expert witness, *see* FREvi 706, to examine into the question of whether adequate pre-construction geologic and seismic investigations were made by defendants, and, if so, whether such studies demonstrate that the Fremont Campus is seismically safe for the members of the plaintiff class.

Id. at pp. 9-10. (Footnote omitted).

Thereafter, on October 27, 1982, the court, pursuant to the previsions of Fed. R. Evid. 706(a), issued written instructions to the court appointed expert witness as to the nature and scope of his duties, a copy of which was filed herein on October 28, 1982. In summary, such written instructions directed the witness, as the first phase of his work, to examine and evaluate the *adequacy* of the geologic, seismic and soils studies of the Fremont Campus conducted by defendants prior to acquisition of the site and/or construction of the new CSB, and to prepare a written report expressing his opinions and conclusions drawn therefrom as to whether such studies were sufficient in nature, scope and extent to comport with sound

professional practice for ascertaining seismic safety. Pursuant thereto, the expert witness delivered to the court his August 25, 1983 detailed written report, a copy of which was served on each of the parties, setting forth his opinions and his conclusion that defendants' studies to date do not provide a data base which is "sufficient for a full appraisal of seismic hazard at [the Fremont Campus]." The report explains the inadequacies which he concludes exist in the present studies and specifies those additional studies and investigative work he believes are essential to supplying a sufficient data base. Letter Report, dated August 25, 1983 (Dr. Richard H. Jahns), p. 4.

On October 12, 1983, after all parties had had an opportunity to review the August 25 report, the court called Dr. Jahns to testify as to his opinions and conclusions, and the reasons therefor, and provided counsel for both sides, at a day-long hearing, full opportunity to examine and cross-examine him thereon. Thereafter the court denied defendants' request to present rebuttal testimony, upon the ground that defendants' October 25 "Offer of Testimony in Rebuttal . . ." did not comply with the court's requirement, enunciated at the October 12 hearing, that a specific *offer of proof* be made in writing.

The court is now satisfied, and therefore finds, that it has been established by a preponderance of the evidence that defendants failed to perform an adequate investigation and analysis of the seismic safety of the Fremont Campus prior to construction of the new CSB thereon, and has still not accomplished the same. *See* subparagraph 7A, *supra* at p. 1. The court, however, for

the reasons previously enunciated in its August 17, 1982 Memorandum of Decision, quoted above at pp. 2-3, is still unable to make a realistic or meaningful appraisal of the seismic hazard facing CSB students at the Fremont Campus and, consequently, cannot finally determine whether the Fremont Campus provides a "free appropriate public education." 20 U.S.C. § 1412(1).

Moreover, before it can make the required appraisal of such hazard, the court finds that specific investigative work, testing and analytical studies, as hereinafter described, are required (1) to determine the possible existence and position of the inferred Harding fault and any other expressions of past ground rupture in the shallow subsurface materials beneath the Fremont Campus, and (2) to determine the characteristics of subsurface sedimentary units beneath the property (and especially beneath that part of the property on which buildings are situated) including thickness, areal dimensions, positions within the sedimentary section, and pertinent properties of constituent materials. Such specific work and studies should consist of the following:

1. Trenches at least 18 feet deep should be excavated across the inferred trace of the Harding fault and across ground immediately northwest or southeast of that part of the property in which buildings are present.

2. The trench exposures should be carefully logged in detail.

3. Depending upon results obtained from this trenching, a need for additional trenching might well be identified.

4. At least 40 additional exploratory boreholes should be drilled and logged to depths of at

least 70 feet; ideally, the upper parts of these holes would be of sufficient diameter to permit direct inspection and sampling of the penetrated materials.

5. The boreholes should be most closely spaced in and immediately adjacent to that part of the property in which buildings are present, and early results of the drilling program should be factored into the choice of sites for subsequent boreholes.

6. The boreholes should be carefully logged in detail, and the ambient level of groundwater should be determined in each hole.

7. Appropriate blow-count records should be obtained for material in all boreholes and should be cross-compared with results from laboratory testing of material samples.

8. Special attention should be given to defining the form and dimensions of ancient bodies of stream-channel deposits, as well as other bodies of relatively sandy sediments.

Because the court believes, as explained above, that attendance at the Fremont Campus may expose students of CSB (members of the plaintiff class) to serious and unreasonable physical risks from seismic occurrences, it concludes that it should not permit defendants to conduct any activities involving the presence of CSB students on the Fremont Campus pending a final judgment herein, *unless* defendants cause to be performed, at a time and in a manner approved by the court, the specific investigative work, testing and analytical studies described in items 1 through 8 on pages 5-6 above.[2] If such

---

[2] Injunctive relief is warranted herein under the Ninth Circuit's so-called "alternative test" since serious questions concerning seismic safety exist and the balance of harm tips decidedly in plaintiffs' favor. *See Benda v. Grand Lodge of IAM*, 584 F.2d 308, 315 (9th Cir. 1978); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1975).

testing and studies are timely and satisfactorily completed by defendants and the data developed therefrom are properly compiled, the court will make the remaining findings and conclusions necessary to the entry of judgment herein. *See* August 17, 1982 Memorandum of Decision, subparagraphs 7B-E, quoted *supra* at pp. 1-2.

Since the development of specifications for the required testing and studies, the selection of appropriate professionals and other personnel to perform the work, and the interim review and analysis of test results will require continuous monitoring and preliminary approvals, and since the court will need professional guidance in performing such interim supervision, it has concluded that a special master should be appointed to perform these duties and to conduct hearings when necessary, make proposed findings, and make appropriate recommendations to the court. Counsel for both sides have previously agreed that if the court should enjoin the operation of CSB at the Fremont Campus but if it should also stay the execution of such injunctive relief upon condition that the foregoing described testing and studies be performed, there should be a special master appointed to assist the court and that Dr. Richard H. Jahns should be the person so appointed.

As specified in the preliminary injunction *infra,* defendants will be granted reasonable periods of time within which to perform the work, testing and studies which are required therein as conditions of the stay of enforcement.

PRELIMINARY INJUNCTION

By reason of the foregoing, and good cause appearing, IT IS HEREBY ORDERED:

1. That defendants, and their agents, employees, attorneys and all persons acting in concert or participating with them, are enjoined and restrained preliminarily, during the pendency of this action or until further order of the court, from

A. Locating or relocating CSB at the Fremont Campus;

B. Housing, caring for, educating, or training CSB students at the Fremont Campus;

C. Conducting any type of activity at the Fremont Campus entailing the presence there of CSB students;

2. That to the extent defendants have enrolled or placed CSB students at the Fremont Campus, they shall cause such students to be removed therefrom and relocated elsewhere;

3. That execution of the provisions of paragraphs 1 and 2 above shall be stayed, pending judgment or until further order herein, if defendants cause the timely performance at their expense and to the satisfaction of the special master[3] of the investigative and other testing work described in items 1 through 8 on pages 5-6 above;

4. That "performance . . . to the satisfaction of the special master," specified in paragraph 3 above, means that the special master must approve (1) the final specifications for the testing and studies, (2) the selection of professionals (geologists, engineers, contractors) to perform the work, (3) the location, depth and scope of all

---

[3] The person who will serve as special master (Dr. Richard H. Jahns) is appointed in a separate Order of Reference.

required trenching, (4) the number, location, spacing, depth and diameter of all exploratory boreholes, (5) the extent and quality of all logging of trench exposures and boreholes, (6) the adequacy of determination of the ambient level of groundwater in each borehole, (7) the adequacy of blow-count records in each borehole, to show materials, and the cross-comparison thereof with results from laboratory testing of material samples, (8) the adequacy of the studies defining the form and dimensions of ancient bodies of stream-channel deposits and other bodies of relatively sandy sediments, and (9) the reasonableness of the time periods within which the various aspects of the work are accomplished;

5. That the following 1984 timetable is established as generally acceptable for performance of the above specified work to be accomplished by defendants:

March 15—Completion of fiscal appropriations process

March 31—Completion of final plans and specifications for the described work, solicitation and consideration of bids from reputable geotechical firms, and awarding of a contract or contracts for the work—including approvals in each instance by special master

June 1-

September 15—On-site investigation and testing (including boring and trenching) plus evaluation and review of results with special master

6. That in order to keep the court and opposing counsel apprised of their progress in performing the foregoing work, defendants shall make periodic joint declara-

tions under penalty of perjury attesting to the following described matters no later than the respective dates specified:

Matter Attested To	*Date of Declaration*
That defendants intend to carry out the testing program required as a condition of the stay of execution	January 13, 1984
That each defendant has taken all steps within his power necessary to commence the administrative and legislative procedures required to perform the described testing program	January 23, 1984
That the fiscal appropriations process has been completed, that the State has the funds necessary to proceed with the testing program, and that the State has let the contract or contracts, as approved by the special master, for the performance of all required work	April 16, 1984

7. That whether or not defendants elect to comply with the conditions specified in paragraph 3 (p.8) above for stay of this injunction, defendants are granted an unconditional stay until January 12, 1984, to enable them to decide whether to comply with the conditions in paragraph 3 above or to take an appeal from this order;

8. That plaintiffs shall not be required to post bond for the issuance of this preliminary injunction, *see City of Atlanta v. Metropolitan Atlanta Rapid Transit Authority,* 636 F.2d 1084, 1094 (5th Cir. 1981) ("The court 'may elect to require no security at all.'"); *Franks v. Nimmo,* 519 F. Supp. 902, 906 (D. Colo. 1981); *Tenants and Owners in Opposition to Redevelopment v. United*

States Department of Housing and Urban Development, 406 F. Supp. 1024, 1050 (N.D. Cal. 1973);

9. That defendants shall defray all costs and expenses incident to performance of the conditions described in paragraph 3 above, including reasonable fees and expenses for the special master.

DATED: December 9, 1983.

/s/ Milton L. Schwartz
UNITED STATES
DISTRICT JUDGE

APPENDIX C

CIVIL NO. S-80-473 MLS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

—o—

STUDENTS OF THE CALIFORNIA SCHOOL FOR THE BLIND, et al.,

Plaintiffs,

vs.

WILSON RILES, et al.,

Defendants.

MEMORANDUM OF DECISION

(Filed Aug. 17, 1982)

(Findings of Fact, Conclusions of Law and Preliminary Injunction Included)

This is a class action suit prosecuted under the Civil Rights Act of 1871, 42 U.S.C. § 1983, the Education of All Handicapped Children Act of 1975 [hereafter "EAHCA"], 20 U.S.C. § 1401 *et seq.*, and the Rehabilitation Act of 1973 [hereafter "the Rehabilitation Act"], 29 U.S.C. § 794. The class for whose benefit the action is maintained consists of "all students, both present and future, and parents and representatives of said students of the California School for the Blind."[1] The representative party plaintiffs are

---

[1] On August 15, 1980, the court issued and filed herein its Memorandum and Order which, *inter alia,* certified the described plaintiff class over the opposition of defendants. On January 20, 1981, the court issued and filed its further order denying defendants' motion to vacate or modify the class certification order.

certain named students currently enrolled in the California School for the Blind [hereafter "CSB"], their parents and representatives, the American Council of the Blind of California, and the National Federation of the Blind of California. Named as defendants are Wilson Riles and David Jannsen [sic] in their official capacities, respectively, as California Superintendent of Public Instruction and California Department of General Services director.

In essence, plaintiffs complain that the newly constructed site and facilities for CSB, completed in the summer or early fall of 1980 at Fremont, California [hereafter "the Fremont Campus"]: (1) fail to provide members of the plaintiff class with a "free appropriate public education" wherein they may receive "special education and related services in the least restrictive environment commensurate with their needs," as mandated by EAHCA and the Rehabilitation Act; (2) fail to make available to members of the class educational programs, services and facilities which are equal, in light of their handicaps, to those furnished to non-handicapped children, as required by the Rehabilitation Act; (3) fail to provide members of the class with "special educational instruction and services . . . needed in order to assure them of the right to an appropriate educational opportunity to meet their unique needs . . . in the least restrictive environment," as mandated by California law, *see* California Education Code § 56000 *et seq.;* and (4) fail to furnish members of the class with the assurance of a geologically or seismically safe place, as required by California law, through proper analysis and testing of the site. *See* California Education Code § 39002 *et seq.* and § 39140 *et seq.*

Plaintiffs equate the language of the statutory mandate and standards with the conclusion that the campus,

viewed in its entirety (location, safety, facilities, educational offerings, orientation and mobility training capabilities, opportunity to experience and interact with the nonhandicapped community, etc.), must guarantee every member of the handicapped class an education enabling that child to achieve his or her full potential for self-sufficiency and independence. *See* Plaintiffs' Trial Brief, at pages 1, 2. The alleged shortcomings which, plaintiffs contend, either individually or in combination with others compel the conclusion that the Fremont Campus fails to comply with these federal and state requirements are as follows:

(1) Geographical isolation of the campus which:

(a) Precludes adequate experience and interaction with the nonhandicapped community;

(b) Severely inhibits access to community cultural programs, athletic and other recreational activities, and vocational experiences;

(c) Precludes students from being physically integrated as fully as possible into a populated and developed area of the surrounding community;

(d) Deprives students of the ability to learn to function independently in the community and in society, as opposed to functioning within an institution;

(2) Failure to ensure the safety of the students at the Fremont Campus, in the following particulars:

(a) Failure to perform an adequate investigation of the seismic safety of the Fremont site;

(b) Failure to adequately review such seismic safety investigation as was performed;

(c) Failure to inspect the construction work performed on the site;

(d) The application of a "double standard," whereby defendants employed less rigorous standards and criteria for themselves at the Fremont Campus than they impose upon local districts in their site selection and construction;

(e) Failure to produce, as an end product, a school site with school located thereon which is in fact safe and/or which is as safe for the students at CSB as other schools in the State of California.

(3) Inadequate facilities for, or accessibility to, appropriate orientation and mobility training areas;

(4) Inadequate accessibility to community areas where learned orientation and mobility concepts can be repeatedly practiced in an appropriate community setting;

(5) Inadequate availability of community resources within a reasonable distance of, or safely accessible from, the Fremont Campus;

(6) Absence of a simply patterned physical environment surrounding the Fremont Campus, thereby

inhibiting the children from engaging in safe, independent travel;

(7) Inappropriate design, layout and size of the Fremont Campus, including

(a) Undue and confusing similarity in size, shape, texture and color of the various buildings;

(b) Unduly complex sidewalk patterns;

(c) Absence of reasonable travel landmarks;

(d) Hazardous rough stucco building exteriors;

(e) Absence of adequate internal hallways, corridors and stairways, inhibiting the perfection of orientation and mobility skills;

(f) Accoustical deficiencies in the deaf-blind classrooms;

(g) Excessive complexity of the campus in general which produces confusion and disorientation;

(h) Hazards created by precast concrete block walkways containing holes in the centers of the blocks;

(i) Deficiencies connected with fluorescent lighting in classrooms;

(j) Unreasonable distances between different types of student activity areas;

(8) Unavailability of competent volunteers to assist in the educational, recreational and living skills programs.

Plaintiffs seek a declaratory judgment determining (1) that the transfer of CSB students to the Fremont Campus from the site in Berkeley where the school had been located since 1869 violates federal and state mandates requiring a free appropriate public education for all handicapped children; (2) that federal and state law requires that so long as local school districts in California are unable to provide appropriate educational programs for visually handicapped students, the California State Department of Education is required to continue to meet the educational needs of those students at CSB; and (3) that the Berkeley site of CSB meets all the statutory requirements and can be made accessible, structurally safe and safe from fire hazards.[2]

Plaintiffs also request a permanent injunction enjoining the placement of blind students at the Fremont Campus, requiring defendants to continue operation of CSB (presumably at a location which is in proper compliance), and "providing" for the use of the Berkeley

---

[2] The court has previously ruled, in response to defense objections interposed to evidentiary questions, that whether or not the Berkeley campus can provide an education which meets applicable federal and state standards is not a proper ultimate factual issue to be considered by this court; that evidence offered by plaintiffs relating to the Berkeley campus was received for the limited purposes of (1) demonstrating a facility which allegedly does provide the required education, and (2) showing that there is, allegedly, an appropriate site and facility available in the event the court finds the Fremont Campus to be in violation as charged. The court reiterates this ruling and holds that the sole issues in this case involve the adequacy and propriety of the Fremont Campus; that whether or not the Berkeley campus does or can meet the federal and state requirements pertaining to the plaintiff class is immaterial to any issue properly before the court and that plaintiffs are therefore not entitled to any judicial determination concerning the Berkeley campus.

campus conditioned upon its being made accessible and fire safe.

HISTORY OF THE CASE

The complaint was filed on June 12, 1980, and amended (for the sole purpose of adding additional named plaintiffs) on August 15, 1980. The answer, filed August 4, 1980, is deemed to apply in all respects to the first amended complaint. In their answer defendants included an affirmative defense of laches based upon plaintiffs' alleged inexcusable failure to file suit at a much earlier date before the Fremont Campus site had been acquired and the school built thereon. This defense was voluntarily withdrawn by defendants at trial and no evidence was offered in support of it.

On August 14, 1980, plaintiffs' motion for class certification and for a preliminary injunction enjoining the projected move to the Fremont Campus was argued, followed by a written decision and order dated August 15, 1980, in which (1) the proposed plaintiff class was certified, and (2) a preliminary injunction was issued enjoining defendants from relocating CSB students to the Fremont Campus pending accomplishment of the notice, administrative hearings and appeals provided for by 20 U.S.C. § 1415, the court having determined that the proposed move constituted a "change in educational placement" rather than a mere geographical change.

In September 1980, when CSB was scheduled to open for the 1980-81 school year, a serious and seemingly insoluble dilemma confronted the parties: the preliminary injunction issued by this court precluded defendants from relocating CSB students to the Fremont Campus pending compliance with the proceedings specified in 20

U.S.C. § 1415, a series of steps expected to consume a number of months, while at the same time state and local officials, notably the State Fire Marshal, would no longer permit defendants to use the buildings at the Berkeley campus to house CSB students. As an emergency measure, therefore, the court issued an order on October 17, 1980, pursuant to written stipulation of the parties, modifying the preliminary injunction to permit the opening of the Fremont Campus on a temporary basis but without prejudice to any of plaintiffs' claims in the lawsuit and without constituting a waiver of any of the rights or claims of those students who should elect to attend CSB at the Fremont Campus.

Defendants thereafter moved to vacate or modify the class certification order of August 15, 1980, and on January 20, 1981, the motion was denied.[3]

It is undisputed that defendants, prior to the filing of this action, failed to give formal notice to the parents or guardians of CSB children of their intent to transfer the children from the Berkeley campus to the Fremont Campus and of their right to an administrative hearing, as specified in EAHCA, *see* 20 U.S.C. § 1415(b); *see* Joint Pretrial Statement, filed March 6, 1981, at ¶21; in fact, it was the failure of defendants to comply with § 1415 notice requirements that impelled the court to issue the August 15, 1980 preliminary injunction pursuant to the provisions of § 1415(c)3). Thereafter, on August 28, 1980, defendant Riles did in fact cause a written no-

---

[3] Defendants had also moved to vacate or modify the August 15, 1980 preliminary injunction, but this motion became moot as a result of the stipulated order of October 17, 1980 modifying the terms of the preliminary injunction.

tice to be sent to such parents or guardians advising them of their § 1415 hearing rights, as a result of which counsel for the named plaintiff class representatives requested a hearing on behalf of their individual clients and also all members of the plaintiff class. *See* Joint Pretrial Statement, filed March 6, 1981, at ¶¶ 22, 23.

Although plaintiffs have never withdrawn their requests for a hearing, such hearing has never been held because the parties agreed (1) that the same issues as are before the court in this action are those which would be presented at an administrative hearing, (2) that an administrative hearing officer could not grant all the relief sought by plaintiffs, and (3) that the matter was an urgent one which required speedy resolution by the court. Consequently, the parties stipulated that exhaustion of administrative remedies would be futile and that the present action should continue without further prosecution of such administrative proceedings. *See* Joint Pretrial Statement, filed March 6, 1981, at ¶¶26, 27, 28, 29.

Trial of the action began on March 31, 1981 and consumed 48 trial days, during which time more than 60 witnesses testified (including some by deposition and some in part by written declarations). It was submitted for decision following oral arguments and extensive briefing. The reporter's transcript encompasses more than 8,000 pages of testimony, the exhibits number in excess of 700, and the briefs embracing argument on the legal issues approach 400 pages in length. As a result, an extended period of time was required for the court to analyze and resolve the conflicting legal positions of the parties and to collate and review the evidence in support of these positions.

On January 19, 1982, at a special post-trial hearing, the court announced that despite defendants' vigorous assertions that geologic safety of the Fremont Campus site and seismic safety of the Fremont Campus buildings are not proper factors to be considered in determining whether the campus affords an appropriate education for CSB students within the meaning of EAHCA or the Rehabilitation Act, it had concluded that geologic and seismic safety are proper factors to be included in arriving at such a determination; that the court would consider such factors in this case, both insofar as they might involve the two applicable federal statutes and also, under the doctrine of pendent jurisdiction, insofar as they might involve violations of state seismic safety laws.[4]

The court went on to announce, in essence:

(1) That were it not for the still unanswered question of seismic safety, the court would have found that plaintiffs had failed to sustain their burden of proving the Fremont Campus does not and cannot provide an appropriate education to the members of the plaintiff class;

(2) That the evidence introduced by plaintiffs has raised serious questions in the court's mind as to the seismic safety of the Fremont Campus, but that because of the present state of incompleteness of such evidence the court is unable to resolve in its

---

[4] Defendants urge that Congress did not intend, in enacting either EAHCA or the Rehabilitation Act, to include physical safety as one of the components of a "free appropriate public education; "any that, therefore, the court should also decline to accept jurisdiction of the purported pendent state claims alleging violations of California seismic safety requirements for the reason that they do not "derive from a common nucleus of operative fact" within the meaning of *United Mine Workers v. Gibbs*, 86 S. Ct. 1130 (1966).

own mind whether plaintiffs have or have not satisfied their burden of proof;

(3) That responsibility for this incompleteness of the evidence cannot be attributed to plaintiffs for the reason that they had no control over or access to the Fremont Campus for purposes of geologic and seismic testing,[5] that substantial additional data can be produced, with the cooperation of defendants, to provide the court with sufficient evidence upon which to base an objective determination of whether plaintiffs have satisfied their burden;

(4) That by reason of the foregoing, the court would exercise its discretionary authority to *sua sponte* reopen the case to take additional evidence on the issue of seismic safety, *see Thomas v. SS Santa Mercedes,* 572 F.2d 1331 (9th Cir. 1978); *Calage v. University of Tennessee,* 544 F.2d 297 (6th Cir. 1976); *Arthur Murray, Inc. v. Oliver,* 364 F.2d 28 (8th Cir. 1966), and that it would exercise its further discretion in this regard by appointing its own expert witness, *see* FREvi 706, to examine into the question of whether adequate pre-construction geologic and seismic investigations were made by defendants, and, if so, whether such studies demonstrate that the Fremont Campus is seismically safe for the members of the plaintiff class.

On March 31, 1982, after considering the written and oral objections of defendants to reopening the case and, in any event, to the firm and individual tentatively selected for appointment by the court as an expert witness, and af-

---

[5] Defendants contend, apart from their "failure to state a claim" arguments set forth in footnote 4, that if plaintiffs have failed to satisfy the court by a preponderance of the evidence of the unsafe condition of the campus, and therefore of the failure to provide an appropriate education, defendants are entitled to judgment in their favor. The court disagrees, for the reasons enunciated in the text, *infra.*

ter considering the written and oral arguments by both sides as to what information, evidence and charge should be made available to the appointed expert, the court issued an order appointing the firm of Lindvall, Richter & Associates, with Dr. Richard H. Jahns as lead consultant, to serve as the court's expert, specifying guidelines for performance of the expert's work, and directing each side to post in advance the sum of $4,000.00 to cover the estimated maximum cost ($8,000.00) of the first phase of the expert's assignment (investigation, analysis and written report as to the adequacy of the geologic, seismic and soils studies performed by and for defendants prior to acquisition and/or construction of the site.) *See* Memorandum and Order, filed March 31, 1982. The order went on to provide as follows:

> In the event plaintiffs fail to make the required deposit [on or before April 12, 1982], the court will refrain from making a decision in the case until the deposit is made and further sanctions are imposed. If defendants fail to make the required deposit within the specified time, *the court will enjoin the use of the Fremont campus by the California School for the Blind until the deposit is made* and further sanctions are imposed.

See Memorandum and Order, filed March 31, 1982, pages 7, 8 [emphasis added].

Prior to April 12, 1982, plaintiffs complied with the deposit order by having their counsel personally guarantee in writing payment up to $4,000.00, upon ten days' notice from the court. On April 12, 1982, defendants notified the court in writing that they declined to comply with the order; the principal reason given was that they believed the court erred in ruling that the scope of the rights guaran-

teed by EAHCA and/or the Rehabilitation Act includes a right of physical safety and that they would prefer having this ruling reviewed on appeal at once without proceeding further on the merits of the safety issue.[6] The court must now respond to defendants' refusal to comply with the March 31 order.

APPLICABLE LAW

The Education of All Handicapped Children Act of 1975 (20 U.S.C. §1401 et seq.)

Pursuant to EAHCA, the federal government provides funds to assist states in the education of handicapped children. *See* 20 U.S.C. § 1401 *et seq.* In order to qualify for such financial assistance, a state must demonstrate that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education." *See* 20 U.S.C. § 1412(1). Parents and guardians of handicapped children are permitted to bring complaints about, *inter alia,* any matter relating to the educational placement of their children or the provision of a free appropriate public education for their children. *See* 20 U.S.C. § 1415(b)(1)(D) and (E). Such complaints are initially heard by state

---

[6] Although this refusal to comply with the March 31 order probably constitutes contempt of court on the part of defendants or, alternatively, warrants the imposition of sanctions, the court recognizes that defendants are actuated by a legitimate and vigorous disagreement with the court as to the scope of the court's authority. Accordingly, the court declines to treat defendants' refusal as a contempt or as an act warranting sanctions and will, instead, resolve the issues on their merits to the extent possible within the limited framework of the evidence.

administrative bodies,[7] but "[a]ny party aggrieved by the findings and decisions" of the administrative body has "the right to bring a civil action with respect to the complaint . . . in any State court of competent jurisdiction or in a district court of the United States . . . ." *See* 20 U.S.C. § 1415(e) (2). Consequently, parents and guardians of handicapped children have a private right of action under EAHCA, by which they may seek to enforce the provisions of the Act assuring their children a free appropriate public education. *See Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, — S. Ct. —, 50 U.S.L.W. 4925, 4933 (June 28, 1982); *Anderson v. Thompson*, 658 F.2d 1205, 1210 n.7 (7th Cir. 1981). In an action brought in a district court of the United States, the court is empowered to "grant such relief as the court determines is appropriate," *see* 20 U.S.C. § 1415(e)(2), including such injpunctive relief as may be necessary to assure the provision of a free appropriate public education, *see Anderson*, 658 F.2d at 1211; *Jaworski v. Rhode Island Bd. of Regents for Ed.*, 530 F. Supp. 60, 63 (D.R.I. 1981).

As recently noted by the Supreme Court, "a 'free appropriate public education' consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the

---

[7] In the case *sub judico*, plaintiffs were not required to exhaust their administrative remedies because the parties stipulated that resort to the state administrative process would be "futile." *See, e.g., Monahan v. State of Nebraska*, 645 F.2d 592, 597 (8th Cir. 1981) ("Although the federal framework mandates initial resort to the state administrative process, 20 U.S.C. § 1415(c)(2), exhaustion is not required where it would be futile . . . .").

instruction." *Rowley*, — S. Ct. —, 50 U.S.L.W. at 4928. EAHCA thus assures handicapped children "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley*, — U.S. —, 50 U.S.L.W. at 4932. "This does not mean that the [handicapped] child deserves a perfect education." *Rettig v. Kent City School Dist.*, 539 F.Supp. 768, 777 (N.D. Ohio 1981). *See also Norris v. Massachusetts Dept. of Ed.*, 529 F. Supp. 759, 767 (D. Mass. 1981) ("The law does not require that the handicapped student shall receive the best possible education. . . ."). Neither does it mean that the handicapped child must be provided services and opportunities "equal" to those provided to nonhandicapped children.[8] *See Rowley*, — S. Ct. —, 50 U.S.L.W. at 4931. Rather,

> [i]nsofar as a State is required to provide a handicapped child with a "free appropriate public educa-

---

[8] As noted by the Supreme Court, a

> requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of "equal" services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.

Rowley, — S. Ct. —, 50 U.S.L.W. at 4931.

> tion," [the Supreme Court has held] that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's [individualized educational program].

Rowley, — S. Ct. —, 50 U.S.L.W. at 4932-33. In determining whether a state has complied with the requirements of EAHCA, the district court's inquiry is

> twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Rowley, — S.Ct. —, 50 U.S.L.W. at 4933 [footnotes omitted]. *The Rehabilitation Act of 1973 (29 U.S.C. § 794)*

"In § 504 of the Rehabilitation Act, 29 U.S.C. § 794, Congress provided that handicapped persons shall not be discriminated against in programs or activities receiving federal funds." *Turillo v. Tyson*, 535 F. Supp. 577, 584 (D.R.I. 1982). The Ninth Circuit has expressly held that there is a private right of action under § 504. *Kling v. County of Los Angeles*, 633 F.2d 876, 878 (9th Cir. 1980). *Accord, Miener v. Missouri*, 673 F.2d 969 (8th Cir. 1982); *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372 (10th Cir. 1981); *Adashunas v. Negley*, 626 F.2d 600 (7th Cir. 1980); *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980), *vacated on other grounds*, 101 S. Ct. 1830 (1981); *NAACP v. Medi-*

cal Center, Inc., 599 F.2d 1247 (3d Cir. 1979); *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 99 S. Ct. 2361 (1979); *Leary v. Crapsey*, 566 F.2d 863 (2d Cir. 1977). Specifically, § 504 provides that:

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

See 29 U.S.C. § 794. "The [Supreme] Court [has] unanimously concluded that the fundamental purpose of Section 504 is to prohibit discrimination against the handicapped rather than mandate affirmative relief for them." *N. M. Ass'n for Retarded Citizens v. State of N. M.*, 678 F.2d 847, 852 (10th Cir. 1982), *citing Southeastern Community College v. Davis*, 99 S. Ct. 2361, 2369 (1979). *See also Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 695 (3d Cir. 1981); *Turillo*, 535 F. Supp. at 587 ("§ 504 is a nondiscrimination statute, not a mandate for affirmative action."). As the Tenth Circuit went on to note:

> Close scrutiny of *Southeastern Community College* and other authorities reveals that a federally-funded education system may be found in violation of Section 504 where the entity's practices preclude the handicapped from obtaining system benefits realized by the non-handicapped.

N. M. Ass'n for Retarded Children, 678 F.2d at 853.

The Civil Rights Act of 1871 (42 U.S.C. § 1983)

"Case law is divided on an availability of § 1983 as a remedy for violations of [EAHCA] and the Rehabili-

tation Act." *Miener,* 673 F.2d at 976. Under that circumstance, and since any and all relief sought by plaintiffs at this stage of the proceedings is available under EAHCA or the Rehabilitation Act, the court need not and will not engage in any analysis of the applicability of § 1983 to the facts of this case.

Pendent State Claims (California Education Code § 39002 et seq., § 39140 et seq., and § 56000 et seq.

Plaintiffs have not proffered any legal authority or evidence demonstrating that the standards imposed by the California Education Code are any more stringent than those imposed by EAHCA and/or the Rehabilitation Act. Further, plaintiffs have not established that the California Education Code provides any remedy not available under the federal Acts. The court is thus of the opinion that plaintiffs can prevail under the California Education Code only if and only insofar as they prevail under EAHCA and/or the Rehabilitation Act. Since any relief obtained under the California Education Code would be cumulative to the obtained under the federal Acts, the court need not and will not engage in any analysis of the applicability of the California Education Code to the facts of this case.

PARTIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants urge that the decision of the Supreme Court in *Rowley* mandates major revision of this court's interim order of January 19, 1982 (summarized on pages 8-10 *supra)* and vacation of its interim written order of March 31, 1982 (summarized on pages 10-11 *supra).* Specifically, defendants contend that the language in

Rowley (1) construing the term "free appropriate public education," and (2) articulating the test for ascertaining whether and to what extent Congress intended to impose conditions on the grant of federal moneys requires this court to hold that geologic and seismic safety are not proper factors to be considered in determining whether a free appropriate public education is available at the Fremont Campus.

The court acknowledges that the decision in *Rowley* requires a careful reconsideration of the interim orders of January 19 and March 31, and it has, therefore, fully reconsidered the same, *sua sponte,* in light of that decision. It has concluded, however, that *Rowley* furnishes no guidance with respect to the remaining crucial disputed legal issue in this case; namely, whether geologic and seismic safety are proper components of an "appropriate education."[9] The court remains of the opinion that EAHCA "specifically provides for residential placement in certain circumstances," *Kruelle,* 642 F.2d at 692, *citing* 20 U.S.C. §§ 1401(16), 1413(a)(4)(B), 45 C.F.R. § 1212.302; *see also Vander Malle v. Ambach,* 673 F.2d 49, 53 (2d Cir. 1982) [emphasis added] ("[A] free appropriate public education at *a suitable institution* remains the responsibility of the State."); *Riley v. Ambach,*

---

[9] In arriving at its determination of January 19, 1982, that "were it not for the still unanswered question of seismic safety, the court would have found that plaintiffs had failed to sustain their burden of proving the Fremont Campus does not and cannot provide an appropriate education" (p.9, *supra*), the court was applying the higher standard, now rejected by *Rowley,* that EAHCA requires the state to maximize the potential of handicapped children commensurate with the opportunity provided to other children. Thus, *Rowley* not only supports but substantially strengthens this court's January 19 conclusion quoted above in this footnote.

668 F.2d 635, 638 (2d Cir. 1981), and that a free appropriate public education cannot be provided at a residential facility that is seismically unsafe.

Defendants point to *Rowley* language in footnote 11 that "Congress, when exercising its spending power, can impose no burden upon the States unless it does so unambiguously," and then go on to assume that "unambiguously" is synonomous with "explicitly" or "expressly." Having arrived at this conclusion, they then argue that the court erred in holding, in its order of January 19, that ". . . personal physical safety is an element of 'an appropriate education'; that if there is not reasonable freedom from such danger, there would be a violation of the *implicit* language of each of these statutory provisions." [emphasis added] The court disagrees with defendants' assumption that if something is "unambiguous," it cannot also be "implicit." According to Webster's Third New International Dictionary, 1976 unabridged edition, a matter which is ambiguous is one capable of being classified in two or more categories; a matter which is implicit is one capable of being understood from something else though unexpressed. The common thread between "unambiguous" and "implicit" appears to be the element of clarity; if the meaning is *clear,* the matter is unambiguous even though it may be implicit rather than explicit.

Accordingly, the court adheres to its January 19, 1982 conclusion that personal physical safety, in this case geologic and seismic safety, is one of the elements of an appropriate education as required by EAHCA.

There is, however, an alternative basis in this case for holding that physical safety is an appropriate ele-

ment for consideration; namely, the requirements specified in § 504 of the Rehabilitation Act. The decision in *Rowley* is limited to a construction of EAHCA; it does not purport to consider the effect of the Rehabilitation Act which, in the instant case, is also before the court. As previously noted, § 504 provides, in pertinent part:

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be . . . denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

See 29 U.S.C. § 794. Section 84.34(c) of the implementing administrative regulations specifies:

> If a recipient . . . operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

See 45 C.F.R. § 84.34(c)

The mandate is clear. Defendants are required to furnish services and activities *and a facility*[10] for the students at CSB that are comparable to those furnished by them at facilities operated for nonhandicapped students. Since it is one of plaintiffs' contentions in this case that the facility at the Fremont Campus is less safe than the

---

10 It has been held that "[w]hile § 504 might require a school system to modify its schools to accommodate handicapped children, it never compels a school system to finance a private educational placement." *Turillo*, 535 F. Supp. at 588. However, where, as here, the State has chosen to place handicapped children at a residential facility, that facility must be "comparable" to school facilities provided to nonhandicapped children.

facilities at other public schools in California, not to mention their contention that it is less safe when viewed in light of CSB students' handicaps, it is manifest that the court must consider the geologic and seismic safety of the Fremont Campus in determining whether or not the requirements of the Rehabilitation Act have been met.

Within the legal framework enunciated above, the court concludes that it is required to make findings of fact on the following four issues, which are the only ultimate facts in dispute:

> (1) Does the Fremont Campus fail to provide members of the plaintiff class with a free appropriate public education as required by EAHCA and/or the Rehabilitation Act?
>
> (2) Does the Fremont Campus fail to make available to members of the plaintiff class educational and other programs, services or facilities comparable to those provided for nonhandicapped children as required by the Rehabilitation Act?
>
> (3) Does the Fremont Campus fail to provide members of the plaintiff class with special education instruction and services needed in order to assure them of the right to an appropriate educational opportunity to meet their unique needs as required by California law (California Education Code § 56000 *et seq.*)?
>
> (4) Does the Fremont Campus fail to provide members of the plaintiff class with the assurance of a geologically or seismically safe environment as required by California law (California Education Code § 39002 *et seq.* and § 39140 *et seq.*)?

Although a simple yes or no answer to each of these four questions is all that is ultimately required to support final conclusions of law, the court elects to be somewhat more specific, in the interest of more fully advising

the parties of the basis for these ultimate determinations. This is particularly important because these findings are, at this preliminary juncture, only partial findings in the sense that they reserve decision on the factual question of geologic and seismic safety. Accordingly, the court makes the following findings of fact with respect to each of the specific deficiencies alleged by plaintiffs which, they contend, either singly or in combination with some or all of the others, results in the denial of rights guaranteed by the federal and state statutes specified above:

1. The geographical location of the Fremont Campus, while not ideally situated in the center of a surrounding community,

A. Does not preclude adequate experience and interaction with the nonhandicapped community;

B. Does not unreasonably inhibit access to community cultural programs, athletic and other recreational activities, or vocational experiences;

C. Does not preclude students from being reasonably integrated into a populated and developed area of the surrounding community;

D. Does not deprive students of the proper opportunity or ability to learn to function independently in the community and in society;

E. Does not unreasonably inhibit access to and from necessary orientation and mobility training areas;

F. Does not unreasonably inhibit access to and from community areas where learned orientation and mobility concepts can be properly practiced in a required community setting;

G. Does not preclude necessary or safe access to and from community resources.

2. Although the physical environment immediately surrounding the Fremont Campus is not as simply patterned as might be considered ideal for multiply handicapped blind children, the students at CSB are not precluded or unreasonably inhibited from engaging in safe independent travel off-campus.

3. It is not true that either the design, layout or size of the Fremont Campus are deficient to the extent they can be considered to deprive any member of the plaintiff class of an appropriate education. In this regard the court more specifically finds as follows:

A. There is no cognizable confusion by reason of similarities in size, shape, texture or color of the various campus buildings;

B. The sidewalk patterns are somewhat complex in some instances but are not unduly detrimental;

C. There is no cognizable absence of reasonable travel landmarks;

D. The rough stucco building exteriors present less than an ideal situation and are, to some extent, inhibiting to student travel; they cannot, however, alone or in combination with other less than ideal conditions, be said to deprive any member of the plaintiff class of an appropriate education.

E. There is a scarcity of international corridors and stairways which makes it less convenient for CSB students to learn and practice those orientation and mobility techniques associated with such physical characteristics; nonetheless, these must be considered minor deficiencies which are not unduly restrictive;

F. The alleged accoustical and flourescent lighting deficiencies in classrooms cannot be classified as

cognizable defects and in any event appear to be susceptible of correction;

G. The campus layout is not excessively complex with respect to proper orientation, nor are the distances between different types of student activity areas unreasonable;

H. The precast concrete block walkways containing holes in the centers of the blocks do not create undue hazards for CSB students.

4. There is no demonstrated lack or unavailability of competent volunteers to assist at the Fremont Campus in the educational, recreational or living skills programs.

5. The aggregate of all deficiencies, defects and failures to achieve the ideal with respect to any of the matters set forth in Findings Nos. 1 through 4 above are insufficient to deprive any member of the plaintiff class from receiving an appropriate education at the Fremont Campus.

6. No member of the plaintiff class is or will be denied access to a free public education at the Fremont Campus.

7. The following facts cannot yet be determined:

A. Whether defendants failed to perform an adequate investigation of the seismic safety of the Fremont Campus site prior to construction thereon;

B. Whether defendants failed to adequately review prior to construction such seismic safety investigation as was performed;

C. Whether defendants failed to properly inspect the construction work in the course of construction;

D. Whether defendants employed less rigorous seismic standards and criteria for the Fremont Cam-

pus than they impose on local school districts in their site selection and construction;

E. Whether the Fremont Campus is (i) seismically safe, (ii) as safe as other public schools in California, or (iii) as safe for the multiply handicapped students at CSB as other California public schools are for their nonhandicapped children.

8. If the disputed facts enunciated in Finding No. 7E above are found in favor of defendants, the court will make ultimate findings by entering a simple "No" answer to each of the four questions of ultimate fact set forth as Nos. (1), (2), (3) and (4) on pages 19 and 20 above. Conversely, if the disputed facts enunciated in Finding No. 7E are found in favor of plaintiffs, the court will make the ultimate findings by entering a simple "Yes" answer to each of such four questions of ultimate fact, it being the court's conclusion that if the Fremont Campus is geologically or seismically unsafe it cannot be said to afford an appropriate education.

Since defendants have declined to assist the court in obtaining the additional available evidence necessary to make appropriate determinations for Findings Nos. 7A through 7E, and since the court perceives it would have no ready access to enforcement of the financial and other requirements imposed upon defendants for the obtaining of additional evidence, the court concludes that it must enjoin defendants from using the Fremont Campus for CSB students until such time as it can obtain the necessary evidence to make and complete Findings Nos. 7A through 7E. This conclusion is compelled by the court's concern that it cannot properly permit defendants to house and educate multiply handicapped blind children at a facility which it believes may be unsafe.

The court thus finds that irreparable injury may occur to members of the plaintiff class unless use of the Fremont Campus is enjoining pending determination of whether or not the campus is seismically safe. Further, the court finds that plaintiffs' contentions raise serious questions regarding the seismic safety of the facility, and that the hardships to be sustained by plaintiffs if they remain at the facility decidedly outweigh the hardships to be sustained by defendants if use of the facility is enjoined. Accordingly, the preliminary injunction will issue. *See Knudsen Corp. v. Nevada State Dairy Com'n,* 676 F.2d 374, 378 (9th Cir. 1982) ("For a preliminary injunction, a party must show either probable success and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships is tipped sharply in its favor."). *See also Los Angeles Memorial Coliseum Com'n v. National Football League,* 634 F.2d 1197 (9th Cir. 1980); *Benda v. Grand Lodge of International Ass'n of Machinists,* 584 F.2d 308 (9th Cir. 1978), *cert. denied,* 99 S. Ct. 2065 (1979).

ORDER AND PRELIMINARY INJUNCTION

By reason of the foregoing, and good cause appearing,

IT IS ORDERED:

1. That defendants, and all persons acting in privity with them, are enjoined and restrained preliminarily, during the pendency of this action or until further order of the court, from

A. Locating or relocating CSB at the Fremont Campus;

B. Housing, caring for, educating or training CSB students at the Fremont Campus;

C. Conducting any type of activity at the Fremont Campus entailing the presence there of CSB students;

2. That to the extent defendants have already enrolled or transferred CSB students to the Fremont Campus, they cause such students to be forthwith removed therefrom and relocated elsewhere;

3. That execution of this order shall be stayed for a period of thirty (30) days from the date hereof, without prejudice to the right of defendants to move, prior to the expiration of the stay, for an additional stay upon a showing of good cause;

4. That plaintiffs not be required to post bond for the issuance of this preliminary injunction, *see City of Atlanta v. Metropolitan Atlanta Rapid Transit,* 636 F.2d 1084, 1094 (5th Cir. 1981) ("The court 'may elect to require no security at all.'"); *Franks v. Nimmo,* 519 F. Supp. 902 (D. Colo. 1981); *Torr v. U.S. Dept. of "H.U.D.",* 406 F. Supp. 1024 (N.D. Cal. 1973);

5. That the award of court costs herein be deferred until entry of judgment.

DATED: August 17, 1982.

Milton L. Schwartz

UNITED STATES DISTRICT JUDGE

APPENDIX D

§ 39002. Investigation of prospective school site; inclusion of geological and engineering studies

The governing board of a school district, prior to acquiring any site on which it proposes to construct any school building as defined in Section 39141 shall have the site, or sites, under consideration investigated by competent personnel to ensure that the final site selection is determined by an evaluation of all factors affecting the public interest and is not limited to selection on the basis of raw land cost only. If the prospective school site is located within the bounaries of any special studies zone or within an area designated as geologically hazardous in the seismic safety element of the local general plan as provided in subdivision (f) of Section 65302 of the Government Code, the investigation shall include such geological and soil engineering studies by competent personnel as are needed to provide an assessment of the nature of the site and potential for earthquake or other geologic hazard damage.

The geological and soil engineering studies of the site shall be of such a nature as will preclude siting of a school in any location where the geological and site characteristics are such that the construction effort required to make the school building safe for occupancy is economically unfeasible. No such studies need be made if the site or sites under consideration have been the subject of adequate prior studies. The evaluation shall also include location of the site with respect to population, transportation, water supply, waste disposal facilities, utilities, traffic hazards, surface drainage conditions, and other

factors affecting the operating costs, as well as the initial costs, of the total project.

For the purposes of this article, a special studies zone is defined as one which is shown on any map, or maps, compiled by the State Geologist pursuant to the provisions of Chapter 7.5 (commencing with Section 2621) of Division 2 of the Public Resources Code. A copy of the report of each investigation conducted pursuant to this section shall be submitted to the Department of Education.

(Stats.1976, c. 1010, § 2, operative April 30, 1977. Amended by Stats.1977, c. 36, § 141, eff. April 29, 1977, operative April 30, 1977.)

§ 39002.5 Geological and soils engineering studies

Geological and soil engineering studies as described in Section 39002 shall be made, within the boundaries of any special studies zone, for the construction of any school building as defined in Section 39141, or if the estimated cost exceeds twenty thousand dollars ($20,000), for the reconstruction or alteration of or addition to any such school building for work which alters structural elements. The Department of General Services may require similar geological and soil engineering studies for the construction or alteration of any school building on a site located outside of the boundaries of any special studies zone. No such studies need be made if the site under consideration has been the subject of adequate prior studies.

No school building shall be constructed, reconstructed, or relocated on the trace of a geological fault along which surface rupture can reasonably be expected to occur within the life of the school building.

A copy of the report of each investigation conducted pursuant to this section shall be submitted to the Department of General Services pursuant to Article 3 (commencing with Section 39140) of this chapter and to the Department of Education. The cost of geological and soil engineering studies and investigations conducted pursuant to this section may be treated as a capital expenditure. (Amended by Stats.1978, c. 362, p. 1064, § 1.)

APPENDIX E

§ 39140. Supervision of design, construction and fire damage repair by Department of General Services

The Department of General Services under the police power of the state shall supervise the design and construction of any school building or, if the estimated cost exceeds twenty thousand dollars ($20,000), the reconstruction or alteration of or addition to any school building, to ensure that plans and specifications comply with the rules and regulations adopted pursuant to this article and building standards published in Title 24 of the California Administrative Code and to ensure that the work of construction has been performed in accordance with the approved plans and specifications, for protection of life and property. Nothing in this section shall be construed to allow a school district to perform work with its own forces in excess of the limitations set forth in Sections 39640 and 39649.

Whenever repairs due to fire damage must be made to any school building previously approved by the Department of General Services, the approved plans and specifications used in the original work under then existing rules, regulations, and building standards may be used without modification, providing all other provisions of this article are carried out.

(Amended by Stats.1979, c. 1152, p. 4224, § 3; Stats.1981, c. 221, p. —, § 1, urgency, eff. July 20, 1981.)

§ 39141. "School building"

"School building" as used in this article means and includes any building used, or designed to be used, for elementary or secondary school purposes and constructed,

reconstructed, altered, or added to by the state or by any city or city and county, or by any political subdivision, or by any school district of any kind within the state, or by any regional occupational center or program created by or authorized to act by an agreement under joint exercise of power, or by the United States government, or any agency thereof.

(Stats.1976, c. 1010, § 2, operative April 30, 1977.)

§ 39141.3. Nonconforming school building; extension of use

Any school building, as defined in Section 39141, operated by a county official, board, or commission which on the effective date of this section is in violation of this article, where compliance therewith was otherwise required, may be continued in use as a school building after June 30, 1975, provided that no such building shall be operated after that date unless such county official, board, or commission requests and obtains from the State Allocation Board authority for use of such building for a specific period after such date.

Concurrent with such request such county official, board, or commission shall file with the State Allocation Board a statement or resolution declaring an intention to utilize the building as a school building after June 30, 1975, pending its repair, reconstruction, or replacement.

The State Allocation Board shall not authorize such county official, board, or commission to use such building after June 30, 1975, unless it has first determined that the affected authority has already proceeded with a plan of total repair, reconstruction, or replacement in a timely manner and the contract has been let for any phase of, and work commenced on, such project.

In no event shall the State Allocation Board authorize the use of such unsafe facilities for a period extending beyond the completion of the replacement facilities or beyond June 30, 1975, whichever occurs first.

(Stats.1976, c. 1010, § 2, operative April 30, 1977.)

§ 39141.5. "School building"; exemption for certain facilities

Where the primary use of either a building or complex within which such building is situated, operated by an official or board of a city, city and county or county, is for purposes other than educational, such as but not limited to correctional, forestry, or hospital purposes, such building shall not be considered to be a "school building" within the meaning of Section 39141 notwithstanding any educational use thereof incidental to such primary purpose.

(Stats.1976, c. 1010, § 2, operative April 30, 1977.)

§ 39141.6. "School building"; exclusion of rooms used for outdoor classes and greenhouses

For the purposes of this article and Article 6 (commencing with Section 39210) of this chapter, "school building" does not include (a) any building of a school district or county superintendent of schools which is used solely for classes or programs in outdoor science, conservation, and forestry in accordance with Article 5 (commencing with Section 8760) of Chapter 4 of Part 6 of Division 1 of Title 1 and which does not occupy, in whole or in part, the same parcel of land upon which there is situated any school maintained by the district or county superintendent, or (b) a greenhouse which is used exclusively for the cultivation or protection of agricultural or horticultural products.

(Added by Stats.1977, c. 36, § 444, eff. April 29, 1977, operative April 30, 1977.)

§ 39142. "Construction or alteration"

"Construction or alteration" as used in this article includes any construction, reconstruction, or alteration of, or addition to, any school building.

(Stats.1976, c. 1010, § 2, operative April 30, 1977.)

§ 39143. Required approval of plans by Department of General Services

The Department of General Services shall pass upon and approve or reject all plans for the construction or, if the estimated cost exceeds twenty thousand dollars ($20,000), the alteration of any school building. To enable it to do so, the governing board of each school district and any other school authority before adopting any plans for such school building shall submit the plans to the Department of General Services for approval, and shall pay the fees prescribed in this article.

Where the estimated cost of an alteration exceeds ten thousand dollars ($10,000) but does not exceed twenty thousand dollars ($20,000), a structural engineer shall examine the proposed project to determine if it is a nonstructural alteration or a structural alteration. If he determines that the project is a nonstructural alteraion, he shall prepare a statement so indicating. If he determines that the project is structural, he shall prepare plans and specifications for the project and shall observe the work of construction. A copy of the engineer's report stating that the work does not affect structural elements, or a copy of the plans and specifications for

structural work, as the case may be, shall be filed with the Department of General Services.

(Stats.1976, c. 1010. § 8, operative April 30, 1977. Amended by Stats.1977, c. 36, § 143, eff. April 29, 1977, operative April 30, 1977.)

§ 39144. Required safety approval by Department of General Services before letting any contract

Except as provided in Section 39144.5, before letting any contract for any construction or alteration of any such school building, the written approval of the plans, as to safety of design and construction, by the Department of General Services, shall be first had and obtained.

(Amended by Stats.1981, c. 1113, p. 4344, § 6.)

§ 39144.5 Fabrication, construction or alteration of relocatable school building with previous approval

Before the commencement of any fabrication, construction, or alteration of a relocatable school building of a type previously approved by the Department of General Services, the written approval of the plans, as to the safety and design of construction, by the Department of General Services, shall be first had and obtained.

(Added by Stats.1981, c. 1113, p. 4344, § 7.)

§ 39145. Requirement of specifications, structural design computations and cost estimates with plans submitted for approval

In each case the application for approval of the plans shall be accompanied by the plans and full, complete, and accurate specifications, and structural design computations, and estimates of cost, which shall comply in

every respect with any and all requirements prescribed by the Department of General Services.

(Stats.1976, c. 1010, § 2, operative April 30, 1977.)

§ 39146. Filing fees for submission of plans for approval; rates

The application shall be accompanied by a filing fee in amounts as determined by the Department of General Services based on the estimated cost according to the following schedule:

(a) For the first one million dollars ($1,000,000), a fee of not more than 0.7 percent of the estimated cost.

(b) For all costs in excess of one million dollars ($1,000,000), a fee of not more than 0.6 percent of the estimated cost.

The minimum fee in any case shall be two hundred fifty dollars ($250). If the actual cost exceeds the estimated cost by more than 5 percent, a further fee shall be paid to the Department of General Services, based on the above schedule and computed on the amount by which the actual cost exceeds the amount of the estimated cost.

(Amended by Stats.1980, c. 1354, p. 4857, § 37.1, urgency, eff. Sept. 30, 1980.)

§ 39147. Fund to which filing fee payable

All fees shall be paid into the State Treasury and credited to the Division of Architecture Public Building Fund, which fund is continued in existence and is retitled the Architecture Public Building Fund, and are available without regard to fiscal years for the use of the

Department of General Services, subject to approval of the Department of Finance, in carrying out the provisions of this article and Article 5 (commencing with Section 39190) of this chapter.

Adjustments in the amounts of the fees, as determined by the Department of General Services and approved by the Department of Finance, will be made within the limits set in Sections 39192 and 39146 in order to maintain a reasonable working balance in the fund.

(Stats.1976, c. 1010, § 2, operative April 30, 1977.)

§ 39148. Preparers of plans, specifications, and estimates; qualifications; observation of construction

(a) Except as provided in subdivision (b), all plans, specifications, and estimates shall be prepared by a licensed architect holding a valid certificate under Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code or by a structural engineer holding a valid certificate to use the title structural engineer under Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code, and the observation of the work of construction shall be under the responsible charge of such an architect or structural engineer.

(b) For the purposes of this section, a mechanical or electrical engineer holding a valid certificate under Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code may be in responsible charge of preparation of plans, specifications, and estimates, and observation of the work of construction where the work is, as determined by the Department

of General Services, of the kind normally performed by engineers certified in the particular branch of engineering for which the engineer is certified. Any architectural or structural work involved shall be the respective responsibility of a licensed architect holding a valid certificate under Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code, or a structural engineer holding a valid certificate to use the title structural engineer under Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code.

(Amended by Stats.1982, c. 735, p. —, § 1.)

§ 39149. Registered school construction inspector

(a) Except as otherwise provided in subdivision (c) or (d), persons employed as inspectors of record to inspect the construction, reconstruction or alteration of any school building shall be either (1) persons who are registered as construction inspectors in the divisions in which they are to be used, as defined by Section 9101 of the Business and Professions Code or (2) persons who are regularly employed for building code enforcement by the local agency having responsibility for such inspection, and are qualified to perform such inspections under the civil service laws or regulations of such local agency.

(b) Except as otherwise provided in subdivision (c) or (d), persons employed as assistants to inspectors of record shall be registered construction inspectors or shall be enrolled as inspectors-in-training in the divisions in which they are to be used, as defined by Section 9101.1 of the Business and Professions Code.

(c) Subdivisions (a) and (b) shall not apply to any architect, structural engineer, civil engineer, land surveyor, mechanical engineer, engineering geologist, or electrical engineer, who holds a valid certificate of registration in this state, insofar as he is practicing within the provisions of the law under which he is registered.

(d) Subdivisions (a) and (b) shall not apply to an inspector approved by the Office of Architecture and Construction and employed pursuant to a particular building contract prior to January 1, 1982 during the performance of that building contract.

(Amended by Stats.1980, c. 75, p. 191, § 1, urgency, eff. April 25, 1980.)

§ 39150. Requires compliance with the provisions of this article and approval of the Department of General Services

No contract for the construction or alteration of any school building, made or executed by the governing board of any school district or other public board, body, or officer otherwise vested with authority to make or execute such a contract, is valid, and no public money shall be paid for any work done under such a contract or for any labor or materials furnished in constructing or altering any such building, unless the plans, specifications, and estimates comply in every particular with the provisions of this article and the requirements prescribed by the Department of General Services and unless the approval thereof in writing has been first been had and obtained from the Department of General Services.

(Stats.1976, c. 1010, § 2, operative April 30, 1977. Amended by Stats.1976, c. 1011, § 33, operative April 30, 1977.)

§ 39151. Reports required of architects, engineers, and inspectors; information required

From time to time, as the work of construction or alteration progresses and whenever the Department of General Services requires, the licensed architect or structural engineer in charge of observation of construction or registered engineer in charge of observation of other work, the inspector on the work, and the contratcor shall each make to the Department of General Services a report, duly verified by him, upon a form prescribed by the Department of General Services, based upon his own personal knowledge, indicating that the work during the period covered by the report has been performed and materials have been used and installed, in every material respect, in compliance with the approved plans and specifications, setting forth such detailed statements of fact as are required by the Department of General Services.

The term "personal knowledge" as used in this section and as applied to the architect, and the registered engineer, means the personal knowledge which is obtained from periodic visits to the project site of reasonable frequency for the purpose of general observation of the work, and also which is obtained from the reporting of others as to the progress of the work, testing of materials, inspection and superintendence of the work that is performed between the above-mentioned periodic visits of the architect or the registered engineer. The exercise of reasonable diligence to obtain the facts is required.

The term "personal knowledge" as applied to the inspector means the actual personal knowledge which is obtained from his personal continuous inspection of the work of construction in all stages of its progress at the site where he is responsible for inspection and, when work is carried out away from the site, that personal knowledge which is obtained from the reporting of others on the testing or inspection of materials and workmanship for compliance with plans, specifications or applicable standards. The exercise of reasonable diligence to obtain the facts is required.

The term "personal knowledge" as applied to the contractor means the personal knowledge which is obtained from the construction of the building. The exercise of reasonable diligence to obtain the facts is required.

(Stats.1976, c. 1010, § 2, operative April 30, 1977.)

§ 39152. Rules and regulations; building standards

Except as provided in Section 18930 of the Health and Safety Code, the Department of General Services may from time to time make such rules and regulations as it deems necessary, proper, or suitable to carry out the provisions of this article.

The Department of General Services shall adopt and submit building standards for approval pursuant to Chapter 4 (commencing with Section 18935) of Part 2.5 of Division 13 of the Health and Safety Code for the purposes described in this article.

(Amended by Stats.1979, c. 1152, p. 4224, § 4.)

§ 39153. Inspections by Department of General Services and appointed inspector

The Department of General Services shall make such inspection of the school buildings and of the work of construction or alteration as in its judgment is necessary or proper for the enforcement of this article and the protection of the safety of the pupils, the teachers, and the public. The school district, city, city and county, or the political subdivision within the jurisdiction of which any school building is constructed or altered shall provide for and require competent, adequate, and continuous inspection during construction or alteration by an inspector satisfactory to the architect or structural engineer and the Department of General Services. The inspector shall act under the direction of the architect or structural engineer as the board may direct, and be responsible to the government board

(Amended by Stats.1981, c. 714, p. 2614, § 87.)

§ 39154. Violations and false statements

Any person who violates any of the provisions of this article or makes any false statement in any verified report or affidavit required pursuant to this article is guilty of a felony.

(Stats.1976, c. 1010, § 2, operative April 30, 1977.)

§ 39155. Structural inspection by Department of General Services upon special request; payment of expenses

Upon written request by the governing board of any school district or upon written request by at least 10 percent of the parents having children enrolled as pupils in any school district as certified to by the county superintendent of schools, the Department of General Services shall make an examination and report on the structural

condition of any public school building of the district, subject to the payment by the governing board of the actual expenses incurred by the Department of General Services. Payment of the expenses may be waived by the Department of General Services on recommendation of the State Superintendent of Public Instruction when it appears to him that the school district in which the public school building is located cannot afford to pay them.

(Stats.1976, c. 1010, § 2, operative April 30, 1977.)

§ 39156. Approval of public school building for occupancy by Department of General Services deemed to meet local building requirements for use as a private school

Any public school building which has been approved by the Department of General Services (formerly Division of Architecture) for occupency shall be deemed to meet the local building requirements for use as a private school.

(Stats.1976, c. 1010, § 2, operative April 30, 1977.)

§ 39157. Certificate of compliance; verified reports

(a) When a school building constructed in accordance with plans and specifications approved by the Department of General Services is completed, the notice of completion is filed, and all final verified reports and all testing and inspection documents, as required by this article or as required by the rules and regulations adopted pursuant to this article, are submitted to and one file with the Department of General Services, and all required fees paid by the school district, the department shall

issue a certification that the school building complies with the requirements of this article. Nothing in this article shall prevent beneficial occupancy by a school district prior to the issuance of this certification.

(b) When a school building, constructed in accordance with approved plans and specifications, is completed but final verified reports, as are required under Section 39151, have not been submitted to the Department of General Services due to the incapacitating illness, death, or the default of any persons required to file such reports, the Department of General Services shall, upon written request of the school district, review all of the project records and make such examinations as it deems necessary to enable it to certify that the school building otherwise complies with the requirements of this article. The Department of General Services may request the school district to have made, reported, and verified any other tests and inspections which the department deems necessary to complete its examinations of the construction.

(c) The costs incurred by the Department of General Services in connection with this section shall be paid by the school district. The actual costs to perform the examinations, tests, and inspections shall be an appropriate cost of the project to be paid from the building funds of the district. Certification of the project by the Department of General Services shall be withheld until all the costs have been paid by the school district.

(d) This section shall not relieve any individual of his or her responsibility to file verified reports, as required in Section 39151, or any other documents required by the rules and regulations adopted pursuant to this

article. This section shall not abrogate the provisions of Section 39154.

(Added by Stats.1982, c. 735, p. —, § 2.)

APPENDIX F

Title 21

Group 1. Safety of Construction of Public Schools
Article 1. General Provisions

1. Purpose.

School buildings constructed pursuant to these rules and regulations shall be designed to resist earthquate forces generated by major earthquakes of the intensity and severity of the strongest experienced in California without catastrophic collapse, but with some repairable architectural or structural damage.

2. Scope.

Chapters 2-23, 2-24, 2-25, 2-26, 2-27, 2-28, 2-29, 2-30, 2-32, 2-37, 2-47 and 2-54 of Part 2, Title 24, CAC designate the structural building regulations which shall apply to the design of, construction, reconstruction, alteration of or addition to any school building as defined in Sections 39141 and 81131 of the Education Code. The term "school building" shall include all buildings, structures, appurtenances and related systems or facilities as interpreted in Section 14.

These rules and regulations established reasonable standards and minimum requirements for the structural integrity of public school buildings to resist, insofar as

practicable, the forces of gravity wind and earthquake for the protection of life and property.

Further, the design and construction of the mechanical and electrical systems in school buildings and shall conform to the applicable building regulations in Title 24, CAC.

Further, the design and construction of school buildings shall comply with the regulations adopted by the State Fire Marshal for the particular occupancies concerned. (See Title 19, CAC.)

3. Delegation of Authority.

All powers, duties, responsibilities pursuant to carrying out the provisions of the Field Act vested by law in the Department of General Services have been delegated by the department to the Chief Structural Engineer, Office of the State Architect, subject to the direction of the State Architect.

5. Application of Building Standards.

Building standards are set forth in Part 2, Title 24, CAC, and have been adopted as a basis for the approval of plans and specifications. These regulations shall not be construed to prevent the use of higher design standards nor to restrict the use of new or innovative design or construction techniques.

Where the designer desires to use innovative design or construction techniques not included in these regu-

lations, it shall be necessary to submit for review and approval information including computations, test data and recommendations covering the design in question. The Office of the State Architect must be satisfied that the degree of safety achieved is equivalent to that achieved by the standard procedures.

6. Approval of New School Buildings.

Plans and specifications shall be submitted to the office for every new school building, regardless of cost, before the plans are adopted by the school board. Before the board may convert into a school building, a structure already owned, or an existing building which has been purchased or leased, the board shall submit application and plans of the building to the office for approval. The plans shall provide for the reconstruction and alterations necessary for compliance with the requirements of these rules and regulations.

The provisions of this section shall not apply to a "Temporary-use building". (See Section 14 for definitions of "New school building" and "Temporary-use building".)

7. Approval for Reconstruction of a Part or Wing of a School Building.

The school board may submit plans and specifications for the reconstruction or alteration of or addition

to any part or wing of a school building, even though the remainder of the building is not safe or has never met the requirements of the Field Act. Approval is given only when the part or wing is a distinct unit in itself from foundation to roof and surrounded by walls or comparable structural elements. The said part or wing must be structurally adequate, without dependence for stability placed on the unapproved parts and, in addition, must be capable of resisting safely any forces which adjacent or contiguous unapproved parts of the school building may exert on the said part or wing. Required exits shall not pass through or be subjected to the hazards of the unapproved parts of the building.

The school board may, on its own responsibility, use the remainder of the building for non-school building purposes and such use is not subject to the approval of the office provided that teachers and pupils are not permitted to enter the unapproved part and provided further that a public notice is posted in a conspicuous place stating that such remainder does not meet the structural standards imposed by law for earthquake safety.

• • •

Article 3. Approval of Drawings and Specifications

15. Application for Approval of Drawings and Specifications.

(a) General. Before adopting plans and specifications the school board shall submit an application to the application to the Structural Safety Section of the Office of the State Architect for written approval of said plans and specifications for any of the following:

(1) The construction of any "new school building" as defined in Section 14.

(2) The reconstruction or alteration of, or addition to, any existing school building if the estimated cost exceeds $20,000. (See Section 8 for optional submittal.)

(3) The lease or purchase of any "relocatable structure" except where occupied as a "temporary-use" building.

(4) The extension of a lease for a "temporary-use" building for more than three years from the date of first occupancy.

(5) The conversion of a non-school building to use as a "school building". (See Section 6.)

It is not necessary to secure approval for maintenance work on school buildings.

(b) Filing. A separate application, in triplicate (see Section 52 for exception), shall be filed with the office for each school building or group of school buildings on each school site. In the event that a number of school buildings, on various and separate sites, are to be constructed from the same plans and specifications, only one application shall be required, provided that all the

units are constructed at the same time and in the same school district. The application shall be submitted on Form SSS-1. Application for Approval of Plans and Specifications (see facsimile in the Appendix), which shall be furnished upon request. The application shall contain a definite identifying name for the school building or buildings, the name of the architect or registered engineer in general responsible charge of the work, the name of the architects or registered engineers who have been delegated responsibility for portions of the work (see Section 16), the estimated cost of the project and all such other information as is requested thereon.

An architect or registered engineer who is a contracting party or who has any employment relationship with any entity which may be acontracting party for the construction shall not perform the functions prescribed by Sections 39148 and 81138 of the Education Code or be delegated responsibility for any portion of the work.

• • •

17. Plans, Specifications, Computations and Other Data.

(a) General. When an application is filed, it shall be accompanied by one complete set of the plans and specifications, the structural design computation, and a fee calculated on the estimated cost. (See Section 20.)

The check prints of plans and specifications, computations and other data filed with the application are the property of and shall be retained by the office after backcheck process is completed and until the project file are closed.

(b) Plans. Plans shall show the use or occupancy of all parts of the school buildings and shall give such

other information as may be required to indicate the nature of the work proposed and to show compliance with the act and these rules and regulations. The plans shall be legible and sufficiently detailed and cross-referenced to show clearly the pertinent features of the construction, and shall have sufficient dimensions to be readily interpreted. Where a project includes several school buildings, the plans for each shall be drawn independently except that details common to all need not be repeated.

Submitted plans and specifications which are obviously incomplete or incorrect, shall be returned to the designer with a request for compliance with these rules and regulations before checking is resumed by the office.

(c) Specifications. Specifications shall completely set forth the requirements for the various types of materials that will enter into permanent construction and shall describe the methods not covered in the technical regulations which are to be used to obtain the required quality of the work shown on the plans as described in the specifications.

(d) Design Computations. Computations, stress diagram and other pertinent data shall accompany the plans and specifications and shall be sufficiently complete so that calculations for individual structural members can be readily interpreted. The computations shall be prefaced by a statement clearly and concisely outlining the basis for the structural design and indicating the manner in which the proposed school building will resist vertical loads and horizontal forces. The computations shall be sufficiently complete to establish that the struc-

ture will resist the loads and forces prescribed in Part 2, Title 24, CAC. Assumed safe bearing pressures on soils and specified strengths of concrete shall be given in computations and noted on plans. Where unusual conditions occur, such additional data as are pertinent to the work shall be submitted.

(e) Site Data. Site data for all school sites shall include a soil investigation report including sub-surface site work, laboratory testing, an evaluation of site soil conditions, a recommendation for the type of foundations to be used and an allowable design value for the soil bearing capacity.

For new school sites located in the "Special Studies Zones" (commonly known as Alquist-Priolo Zones) as described in Sections 39002 and 39002.5 of the Education Code, a geologic and earthquake hazard report including an evaluation of both known and potentially active local and regional fault systems and of slope stability and liquification potential as hazards to school structures, shall be submitted with the application.

For existing school sites, the Architect shall prepare a geologic hazard statement evaluating the potential for geologic or earthquake damage for projects involving alterations, additions or new construction.

(f) Estimates of Cost. Estimates of cost shall be based on the cost prevailing at the time the plans and specifications are submitted to the office. The estimated cost of a project shall be increased as necessary to include the estimated cost of every alternate building or portion thereof shown on the plans or specification as if each alternate building and portion were to be constructed separately and simultaneously.

When a contract amount, or the cumulative total of two or more contract amounts, exceeds the estimated cost by more than 30 percent the estimated cost shall be revised. An additional fee based upon the revision shall be paid before proceeding with the work. When the actual cost of constructing all the work shown on the approved plans is less than 70 percent of the estimated cost a refund may be claimed. (See Section 22 for actual cost.)

(g) Deferred Approvals. Where a portion of the construction cannot be adequately detailed on the approved plans because of variation in product design and manufacture, the approval of plans for such portion may be deferred until the material suppliers are selected provided the following conditions are met:

(1) The plans clearly indicate that a deferred approval by the office is required for the indicated portions of the work prior to fabrication and installation.

(2) The plans and specifications adequately describe the performance and loading criteria for such work.

(3) The architect or structural engineer responsible for preparation of plans and specifications for the project manually signs the plans and specifications for the deferred approval items. Such architect or structural engineer must prepare his own plans; however, he may adopt or modify plans prepared by a manufacturer or anyone else provided that he accepts responsibility thereof.

(h) Signatures Required. All plans and specifications submitted for approval shall bear the manual signature of the architect or professional engineer in general responsible charge of design. When responsibility for a portion of the work has been delegated, the plans and

specifications covering that portion of design shall also bear the manual signature of the responsible professional engineer or architect.

* * *

34. Supervision by the Office of the State Architect.

During construction, reconstruction, repair, alteration of or addition to any school building, the office, as provided by the act, shall make such inspection as in its judgment is necessary or proper for enforcement of the act and the protection of the safety of the pupils, the teachers and the public. If at any time as the work progresses, prior to the issuance of the final approval, it shall be found that modifications or changes are necessary to secure safety, orders shall be issued by the office for such modifications or changes.

Title 24

Foundation Investigation

Sec.2-2905.

(a) General. Soil investigation reports which include foundation or pile capacity recommendations, recommendations regarding installation, and, in the case of engineered fills, directions as to materials and construction procedures shall be prepared by a civil engineer qualified to undertake investigations for foundation and earthwork design. Investigations involving test borings, exploration shafts or load tests shall be made under the engineering control of such a civil engineer.

Site investigations and reports pertaining to geologic hazards shall be made where required by Sections 39002 and 39002.5 of the Education Code and by Sections 94041 and 94049(c) of Title 22, CAC.

(b) Investigation. Whenever it is necessary to make special investigations sufficient borings or exporation shafts shall be made as deemed necessary by such civil engineer to evaluate the character of the soil under the entire building or structure, except that there shall be not less than 1 boring or exploration shaft for each 5,000 square feet (464.5152 square meters) of building area at the foundation level with a minimum of two, provided, however, that except for unusual conditions, not more than 10 borings or shafts shall be required. The possibility of liquefaction under seismic disturbance shall be considered in the investigation. Borings shall be of sufficient size to permit visual examination of the soil in place, or in lieu thereof, cores shall be taken. The agency making soil investigations and tests shall give the Office of the State Architect sufficient advance notice of the tests so that arrangements can be made for such inspections as may be necessary.

(c) Reports. Soil investigation reports which recommend that fills be placed and which prescribe materials and procedures for placing shall indicate that in the judgment of the investigating engineer such fills and underdying materials will not liquefy or permit unequal settlements and will transmit lateral forces from the building foundations to the natural soils below under anticipated service conditions, including seismic disturbances.

Soil investigation reports which do not recommend that fills be placed shall indicate that in the judgment of the soils engineer the foundation materials will not liquefy or permit unequal settlements.

(e) Adjacent Loads. The slope between bottom edges of adjacent footings shall not exceed 1 vertical to 2 horizontal unless otherwise recommended by a soil report.

Office - Supreme Court, U.S.
FILED
OCT 31 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-436

In The

Supreme Court of the United States

October Term, 1984

Bill Honig, Superintendent of Public Instruction for the State of California, and William Anthony, Director of General Services for the State of California,

Petitioners,

v.

Students of The California School for the Blind, et al.,

Respondents.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN K. VAN DE KAMP, Attorney General of the State of California

THOMAS E. WARRINER
Assistant Attorney General

MARGARET A. RODDA
DENNIS ECKHART*
Deputy Attorneys General

THOMAS K. McGUIRE
Attorney at Law

1515 "K" Street, Suite 511
Sacramento, California 95814
Telephone: (916) 324-5348

Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

18 pp

TABLE OF CONTENTS

	Page
INTRODUCTORY STATEMENT	1
APPENDIX—Dissent From the Failure of the Court to Consider This Case En Banc	App. 1

INTRODUCTORY STATEMENT

On October 18, 1984, there was filed in the Court of Appeals for the Ninth Circuit a Dissent From the Failure of the Court to Consider This Case En Banc. Six judges of the court joined in the Dissent and directed that the Dissent be published.

The Dissent bears directly upon several of the issues raised in the Petition for Writ of Certiorari, filed in this Court on September 17, 1984. The Dissent appears as the appendix to this supplement.

JOHN K. VAN DE KAMP, Attorney General of the State of California

THOMAS E. WARRINER
Assistant Attorney General

MARGARET A. RODDA
DENNIS ECKHART*
Deputy Attorneys General

THOMAS K. MCGUIRE
Attorney at Law

1515 "K" Street, Suite 511
Sacramento, California 95814

Telephone: (916) 324-5348

*Counsel of Record

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-1506

STUDENTS OF CALIFORNIA SCHOOL
FOR THE BLIND, et al.,

Plaintiffs-Appellees,

v.

BILL HONIG, in his capacity as Superintendent of Public Instruction of the State of California, et al.,

Defendants-Appellants.

DISSENT FROM THE FAILURE
OF THE COURT TO CONSIDER
THIS CASE EN BANC

(Filed October 18, 1984)

SNEED, Circuit Judge, with whom Circuit Judges GOODWIN, WALLACE, KENNEDY, POOLE, and BEEZER join, dissenting from failure to take en banc:

I dissent from the failure of this court to consider en banc the correctness of those portions of this court's panel decision in *Students of Calif. School for the Blind v. Honig*, 736 F.2d 538 (9th Cir. 1984), that construed the Education for All Handicapped Children Act of 1975 (EAHCA), 20 U.S.C. §§ 1232, 1400-1401, 1405-1406, 1411-1420, 1453 (1982). The panel's construction, in my opinion, is erroneous and clearly unnecessary to the result the panel reached. It also reflects an insensitivity to the most recent relevant Supreme Court pronouncements and to the principles of federalism those pronouncements sought to explicate. Finally, it disregards the limits on "creative

interpretation" that a keener appreciation of the doctrine of separation of powers would have imposed.

I.

In *Students,* a group of handicapped students challenged the California Department of Education's (the Department) proposed move of its residential school for the blind from Berkeley to Fremont on the basis that the Department had failed to test the Fremont facility adequately for seismic safety, as required by Cal. Educ. Code §§ 39002-39002.5 (West 1978 & Supp. 1984). The students brought suit in federal court alleging that the Department's failure violated both EAHCA and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982). The district court found that the Department's seismic investigation was inadequate. Consequently, the court preliminarily enjoined the Department to conduct additional tests or close the Fremont facility. The *Students* panel affirmed and a request was made by a circuit judge to take the case en banc.

The panel concluded that the Supreme Court's recent pronouncement in *Pennhurst State School & Hosp. v. Halderman (Pennhurst II),* 104 S. Ct. 900, 911 (1984), that the Eleventh Amendment[1] bars injunctions ordering state officials to obey state law, presented no obstacle to the preliminary injunction issued by the district court. *Students,*

---

1. Although by its terms, the Eleventh Amendment does not literally apply to suits brought against a state by its own citizens,, the Court's opinion in *Hans v. Louisiana,* 134 U.S. 1 (1890), "established that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Employees v. Department of Pub. Health & Welfare,* 411 U.S. 279, 280 (1973).

736 F.2d at 543-44. The court distinguished *Pennhurst II* by asserting that the instant action was not a case where a district court had ordered state defendants to conform their conduct to state law; rather, the district court had ordered the Department to abide by two federal statutes which incorporate law standards. *Id.* at 543. These two statutes were EAHCA and section 504 of the Rehabilitation Act of 1973.[2] It concluded that the students' claims were cognizable under *both* statutes. *Id.* at 544-47.

II.

I have no quarrel with the court's interpretation of section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1982), which prohibits discrimination on the basis of an individual's handicap "under any program or activity receiving Federal financial assistance."[3] Assuming that the

---

2. The *Students* panel observed, *see* 736 F.2d at 543-44, that a state waives its Eleventh Amendment immunity under EAHCA by participating in a federal program to educate handicapped children. *See Department of Educ., State of Hawaii v. Katherine D.*, 727 F.2d 809, 818-19 (9th Cir. 1983). (With regard to *Katherine D.*, a petition for rehearing and a suggestion for rehearing en banc are pending. These do not involve issues that are relevant to the present case. *Students*, 736 F.2d at 543 n.2.)

As to section 504 of the Rehabilitation Act, the *Students* court acknowledged the holding in *Scanlon v. Atascadero State Hosp.*, 735 F.2d 359 (9th Cir. 1984), that the Eleventh Amendment presents no bar to actions brought pursuant to section 504. *See* 736 F.2d at 544.

3. Section 504 provides, in relevant part:

> No otherwise qualified handicapped individual is the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794 (1982). The *Students* court's analysis of section 504 is cogent and well taken, *see* 736 F.2d 546-47; there is no need to duplicate it in its entirety here.

Fremont facility does not meet California's seismic safety standards and is inferior to other public school buildings, the *Students* panel correctly concluded that the students had raised a serious question as to the availability of relief under section 504. *See* 736 F.2d at 546-47.

Thus, I do not write because I object to the result the *Students* panel reached. rite solely because the panel's EAHCA analysis was un..cessary and erroneous. In a large circuit such as this, such panel outreach tends to loosen the normal bonds of judicial restraint and to encourage an unseemly form of rushing to the clerk's office with holdings quite beyond the requirements of the case.

III.

The panel's outreach springs from its interpretation of EAHCA's condition of funding, 20 U.S.C. § 1412(1), which requires states to "ha[ve] in effect a policy that assures all handicapped children the right to a free appropriate public education." To be a "free appropriate public education," section 1401(18)(B) of EAHCA requires that such education "meet the standards of the State educational agency.[4] The panel used this to impose a federal duty to conform to California's seismic safety provisions. *See* 736 F.2d at 544-46. This, in effect, extends to handi-

---

4. The statutory definition, 20 U.S.C. § 1401(18), provides:

> The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

capped children a federal cause of action to redress a violation of *any* state requirement concerning education, even requirements that benefit all children generally. This is a right nonhandicapped children do not have.

My point can be made by way of example. Had the handicapped children in this case attended a public school, together with nonhandicapped students, built in violation of California's seismic safety standards, the handicapped children, under the panel's view, would enjoy a federal cause of action while their nonhandicapped companions would not,[5] even though the risk resulting from the violation threatens all students equally.[6] I do not believe Congress intended to federalize all state law pertaining to education for the benefit of handicapped students. No legislative history supports this result. Congress passed EAHCA to ameliorate the unique problems faced by handicapped students. The scope of EAHCA should be interpreted to achieve this end only.

First, section 1401(18) stresses that "'free appropriate public education' means *special* education and re-

---

5. As it does not fall under EAHCA, the Supreme Court's holding in *Pennhurst II*, 104 S. Ct. at 900, 911 (1984), would bar the nonhandicapped students' cause of action insofar as it would be premised on state law.

6. Of course, an earthquake presents more of a threat to a blind child than it does to a child with unimpaired vision. But it is possible to conceive of a handicap—such as a learning defect—that is not especially dangerous in the event of an earthquake or a violation of state provisions relating to education—such as unacceptably impure drinking water—that does not bear unduly on the handicapped. In any event, the *Students* court's reading does not allow these distinctions and provides a federal cause of action for violation of any state requirement pertaining to education, without regard to the surrounding circumstances.

lated services which . . . meet the standards of the State educational agency . . . ." 20 U.S.C. § 1401(18) (emphasis added). Section 1401(16) further defines "special education" as "specially designed instruction . . . to meet the unique needs of a handicapped child . . . ." Finally, 20 U.S.C. § 1401(17) defines "related services" to include "such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education . . . ."

This emphasis on "special education" and "unique needs" belies the notion that EAHCA creates a federal cause of action with respect to all state requirements pertaining to education, including states' general education requirements. Rather, EAHCA imposes a structure on the states that requires individual consideration of each handicapped child's particular needs and provides a federal cause of action to redress the failure of state agencies to put in place standards designed to meet those special needs. *See* 20 U.S.C. § 1415(a) ("Any State educational agency . . . which receives assistance under this subchapter shall establish and maintain procedures . . . to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education . . . ."); *id.* § 1415(e) (an aggrieved party "shall have the right to bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. . . . [T]he court . . . shall grant such relief as [it] deems appropriate.").

Second, as already mentioned, legislative history offers no support for the panel's interpretation. Acting on a finding that "there are more than eight million handi-

capped children in the United States today [whose] special educational needs . . . are not being fully met," 20 U.S. C. § 1400(b) (1)-(2) (congressional statements and declarations), Congress passed EAHCA "to assure that all handicapped children have available to them . . . a free appropriate public education *which emphasizes special education and related services designed to meet their unique needs," id.* § 1400(c) (emphasis added). Accordingly, Congress required that states "remain[] responsible for providing an appropriate education designed to meet the specific needs of the handicapped child at no cost to that child's parent." S. Rep. No. 168, 94th Cong., 1st Sess. 10 (1975) (discussion of the definition of "free appropriate public education"), *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1434. Based on the recognition that such a mandate entails enhanced costs, *see* H.R. Rep. No. 332, 94th Cong., 1st Sess. 11-12 (1975), stemming from factors such as the need to train teachers and engage additional support personnel to handle the problems presented by educating handicapped children, *see* S. Rep. No. 168, 94th Cong., 1st Sess. 33-34 (1975), *reprinted in* 1975 U.S. Code Cong. & Ad. News 1456-58, EACHA provides funding to defray the burden placed on the states. But the EAHCA focus is on the *additional* cost occasioned by educating the handicapped: "[M]onies must be directed toward . . . 'excess cost' factors . . . . A local school district must determine its average annual per pupil expenditure for all children being served, and then apply the federal dollars only to those additional cost factors for handicapped children beyond the average annual per pupil expenditure." H.R. Rep. No. 332, 94th Cong., 1st Sess. 13 (1975); *see* 20 U.S.C. § 1414(a)(2)(B). Congress plainly did not intend EAHCA to subsidize state and local funds ordinarily

available for general public education. *Id.* Nor did it intend the subsidy available to the handicapped to be diminished to secure the performance by the state of its responsibilities to general education. Yet this is what the *Students* panel may have accomplished. Litigation, such as this case represents, which results in ordering a state to abide by its general education requirements effectively reduces the total resources available to both the handicapped and the nonhandicapped. Only an increase in state support of general education or an increase in the federal subsidy would avoid this reduction. The first will always be problematic, even if required by federal law, while the second would involve the use of the needed increment to promote performance by the state of its general educational responsibilities. I do not think Congress sought to have its subsidy serve this purpose or be imperiled by possible diversion to public education in general.

Finally, the Ninth Circuit cases marshalled by the *Students* panel do not support its result. Although the panel cited *Mountain View-Los Altos Union High School Dist. v. Sharron B.H.*, 709 F.2d 28 (9th Cir. 1983), for the proposition that physical safety is part of a free appropriate public education, that case in fact reserved its judgment on the question of safety. *Id.* at 30. Finding that a parent could not unilaterally transfer her child to a private school before the EAHCA administrative process had run its course and then seek reimbursement from the state, the court "le[ft] open the possibility of reimbursement where a parent's unilateral transfer is justified by a grave and immediate threat to the child's physical health . . . ." *Id.* That situation was not before it. *Id.*

This court did face a claim that a proposed placement threatened a handicapped child's health in *Department of Educ. State of Hawaii v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983). The plaintiff in that case suffered from cystic fibrosis and tracheomalacia, ailments which required her to wear a tracheostomy tube. *Id.* at 812. She claimed that a proposal to place her at a normal public school, where the state would train the school's staff to attend to her daily medical needs and to provide emergency medical services should her tube become dislodged, did not offer her a free appropriate public education. *Id.* at 812, 814-15. This was because she perceived that the staff was reluctant to perform the necessary services. This court rejected her contention, finding that there was insufficient evidence to indicate that the school staff would not perform the services.[7] *Id.* at 815.

The most important element of *Katherine D.* for purposes of the present case is the nature of the health threat alleged. The alleged threat to the plaintiff's health stemmed exclusively from the school's proposed method of dealing with her handicap. It was the school's alleged reluctance to provide the necessary and unique services to accomodate (sic) the plaintiff's ailment that threatened her health and safety. She was not faced by a violation that threatened all children equally. Therefore, *Katherine*

---

7. The plaintiffs claim was based on two pieces of evidence: an overheard conversation between two unidentified teachers expressing reservations about administering the necessary services and a grievance petition filed by unions representing school employees seeking to clarify whether their contracts required union members to perform the services. 727 F.2d at 815.

D. provides no support for the result reached by the *Students* panel that I am questioning.

In sum, neither the statute, the legislative history, nor the relevant case law supports the *Students* panel's broad reading at EAHCA.

IV.

The *Students* panel's construction of EAHCA also displays a lack of sensitivity to the principle of federalism that animates the Supreme Court decisions which touch on immunity of states from suits in federal court under the Eleventh Amendment and on Congress' power to impose obligations on states through the use of its spending power. *See Pennhurst II,* 104 S. Ct. 900, 911 (1984); *Board of Educ. v. Rowley,* 458 U.S. 176, 204 n.26 (1982); *Pennhurst State School & Hosp. v. Halderman (Pennhurst I),* 451 S. Ct. 1, 17 (1981). Furthermore, the panel disregarded the limits on statutory interpretation which I believe are implied by the doctrine of separation of powers.

While the Eleventh Amendment does not preclude actions seeking prospective relief against state officials predicated on violations of federal law, *Edelman v Jordan,* 415 U.S. 651, 663-71 (1974); *Ex parte Young,* 209 U.S. 123 (1908), the Supreme Court decided in *Pennhurst II* that it stands as an absolute bar to actions in federal court alleging that state officials have violated state law, *see* 104 S. Ct. at 910-11. In reaching this result, the Court emphasized that its "reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system." *Id.* at 907.

Promotion of federal supremacy is not served by entertaining in federal courts actions by persons against states based on state law. *Id.* at 911. State courts are available for that purpose. To do otherwise impairs the states' constitutional immunity. And as the Court in *Pennhurst II* observed, "[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Id.*

Also in *Pennhurst I*, 451 U.S. 1 (1981), the Supreme Court urged hesitancy in construing statutes imposing obligations on the states enacted by Congress using its spending power:

> The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

Id. at 17 (citations and footnote omitted). The Court later quoted this language with approval in *Board of Educ. v. Rowley*, 458 U.S. 176, 204 n.26 (1982), a case that construed EAHCA.

The *Students* panel brushed aside these considerations. It distinguished *Pennhurst II* by asserting that "[t]he district court did not order the state defendants to conform their conduct to state law, but to abide by federal statutes which incorporate certain aspects of state law," 736 F.2d at 543 (footnote omitted), and then it moved on

to construe EAHCA.[8] In doing so, however, the panel failed to recognize that the state sovereignty concerns raised by *Pennhurst II* necessarily color the statutory interpretation question as well. The panel similarly disposed of the concerns regarding Congress' spending powers raised by the Supreme Court in *Pennhurst I* and *Rowley:* It observed — with tautological certainty — that "California knew when it accepted federal monies for programs funded under EAHCA that it would have to meet the standards established by its educational agency, and that those standards encompassed seismic safety of school sites." 736 F.2d at 545.

The instant case presents concerns rooted in a fidelity to our federal system similar to those raised by the Su-

---

8. The *Students* court did consider whether the Department had waived its Eleventh Amendment protection. *See* 736 F.2d at 543-44. But this analysis of the waiver issue may have been misplaced. The present case is not like *Department of Educ., State of Hawaii v. Katherine D.,* 727 F.2d 809 (9th Cir. 1983). There, the plaintiff sued for *reimbursement* of tuition paid to a private school. Because such reimbursement constitutes "a retroactive award of monetary relief" barred by the doctrine of *Edelman v. Jordan,* 415 U.S. 651 (1974), the question of waiver was properly presented. Here, by contrast, the district court awarded an injunction, which operates *prospectively. See id.* at 668 ("State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury then if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young* . . . ."). Thus, the sole question presented is whether EAHCA incorporates California seismic safety standards. If it does, *Edelman v. Jordan* and *Ex parte Young* dictate that the Eleventh Amendment presents no bar to the award of prospective relief. But if it does not, the *Pennhurst II* holding that the Eleventh Amendment forbids prospective relief as well where suits allege violations of state law comes into play. Whether California or the Department has waived its immunity is therefore not at issue.

preme Court in *Pennhurst II*. Although here it is Congress, and not the federal courts, that purports to require state officials "to conform their conduct to state law," we nevertheless should be wary of recognizing federal rights premised on the incorporation of state law into federal law when Congress has spoken most indistinctly. In such a situation, Congress and not this court should delineate where federal jurisdiction begins and where it ends. When Congress fails to do so with the requisite precision, a sound appreciation of the principle of separation of powers suggests that the federal courts should stay their hand until the Congressional voice is clear and distinct. At present it is not.

Therefore I must respectfully dissent from this court's failure to rehear the case en banc.

No. 84-436

Office - Supreme Court, U.S.
FILED
DEC 7 1984
ALEXANDER L. STEVAS
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

BILL HONIG, Superintendent of Public Instruction for the State of California, and WILLIAM ANTHONY, Director of General Services for the State of California,
Petitioners,

v.

STUDENTS OF THE CALIFORNIA SCHOOL FOR THE BLIND, *et al.*,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARMANDO M. MENOCAL, III
PUBLIC ADVOCATES, INC.
1535 Mission Street
San Francisco, CA 94103
Telephone: (415) 431-7430
*WILLIAM ALSUP
PENELOPE A. PREOVOLOS
MORRISON & FOERSTER
One Market Plaza
Spear Street Tower
San Francisco, CA 94105
Telephone: (415) 777-6000
MICHAEL BROOKS CARROLL
CARROLL, WELLER & HAINES
601 Montgomery Street
San Francisco, CA 94111
Telephone: (415) 788-7600
Attorneys for Respondents

**Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF THE CASE	1
ARGUMENT	10
I. THE APPEAL FROM WHICH A WRIT OF CERTIORARI IS SOUGHT IS MOOT OR WILL BECOME MOOT BEFORE THIS COURT CAN HEAR OR DETERMINE THE ISSUES PRESENTED	10
II. THE PETITION IS NOT APPROPRIATE FOR CERTIORARI	17
A. The Issues Purportedly Presented Are Either Not Ripe for Review or Are Not Presented by the Record	17
B. Petitioners' EAHCA Arguments Do Not Justify Grant of Certiorari	23
C. Petitioners' Section 504 Arguments Do Not Justify Grant of Certiorari	28
CONCLUSION	31

TABLE OF AUTHORITIES

	Page
Cases	
American Construction Co. v. Jacksonville, Tennessee & Kentucky Railway Co., 148 U.S. 372 (1938)	17
Board of Education v. Rowley, 458 U.S. 176 (1982)	23-24
County of Los Angeles v. Davis, 440 U.S. 625 (1979)	14
Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 (1916)	17-18
Newman v. Alabama, 683 F.2d 1312 (11th Cir. 1982), cert. denied, 103 S. Ct. 1773 (1983)	14
Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900 (1984) ...	22-23, 28
Sannon v. United States, 631 F.2d 1247 (5th Cir. 1980)	14

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 20, 29-30

United States v. Board of Education of the City of New York, 543 F.2d 1 (2d Cir. 1976) 14

University of Texas v. Camenisch, 451 U.S. 390 (1981) 10-16

Statutes

20 U.S.C.
§ 1401 ..... passim
§ 1401(18)(B) 22, 23

29 U.S.C. § 794 ..... passim

INTRODUCTION

The petition is moot because the terms of the preliminary injunction at issue have been carried out. Petitioners seek to breathe certworthiness into this moot, interlocutory matter by cloaking it in the principles of federalism articulated by this Court in several of its recent decisions. These principles, however, alter neither the Article III doctrine of mootness nor the general principles of certworthiness, none of which is met in the present case. Accordingly, the petition must be denied.

STATEMENT OF THE CASE

Respondents are students of the California School for the Blind. They filed the present case on June 12, 1980, challenging petitioners' decision to relocate the California School for the Blind ("school" or "CSB"), then in

Berkeley, California, to Fremont, California. Respondents' lawsuit involved two general factual claims. First, respondents alleged that because of its geographic isolation and certain other factors, the Fremont campus could not provide the students with the "appropriate education" guaranteed by the Education for All Handicapped Children Act ("EAHCA"), 20 U.S.C. section 1401 et seq.; section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. section 794; and state law (the "education" case). Second, respondents contended that petitioners had violated EAHCA, section 504 and state law because the physical facilities at the Fremont campus pose an unacceptably high risk to respondents' lives and physical safety in a major earthquake; because the Fremont campus of CSB is not as safe in an earthquake as other California schools; because

the Fremont campus in not as safe for its occupants as are other California schools for their occupants; because the seismic safety of the Fremont campus has never been adequately investigated; and because the seismic safety of the Fremont campus has not been investigated as adequately as the seismic safety of other California schools (the "seismic" case).[1/]

Respondents presented extensive evidence at trial that the Fremont CSB site had never been properly tested for seismic safety and was, in fact, unsafe. Respondents' expert witnesses testified

---

1 Contrary to Petitioners' representations, the seismic safety issues were pled in the complaint as well as being included in the joint pretrial statement, and were explicitly included, over petitioners' opposition, in the court's pretrial order. Petitioners, having essentially ignored the seismic issues throughout the pretrial phases of the litigation, moved to strike these issues from the pretrial order five days before trial began; the court denied their motion.

that the seismic safety studies of the site were grossly inadequate to satisfy either state law or sound professional standards; that a proper fault investigation was never done despite evidence that there was earthquake faulting beneath the site; and that no site in the state of California would experience a higher earthquake intensity than the Fremont site. Each of these experts testified that the site posed a serious life safety hazard to its students.

Trial of all issues concluded on September 17, 1981; the district court announced its partial decision on January 19, 1982. The district court first ruled that respondents had failed to prove the "education" case by a preponderance of the evidence. The court then ruled that it had jurisdiction of the seismic safety issues pursuant to EAHCA, section 504, and pendent jurisdiction.

The court, however, stated that it could not determine the seismic safety issues; that "because eminent seismologists, geologists and engineers testified in sharp and dramatic opposition to each other," the court required the assistance of a "neutral expert" to resolve these issues.

The district court accordingly appointed Lindvall, Richter & Associates and, as lead consultant, Dr. Richard Jahns, and issued written instructions to Lindvall, Richter and Dr. Jahns, directing them to determine whether the seismic studies of the Fremont site were adequate "to comport with sound professional practice for ascertaining seismic safety." Dr. Jahns delivered a detailed written report in which he concluded that the studies were not adequate, and further specified the tests necessary to determine

the seismic safety of the Fremont campus.[2/]

The district court ruled on December 9, 1983 that defendants must perform the recommended tests in order that the court could finally determine the seismic safety of the Fremont campus (see App. B).[3/] Specifically, the court found "that it has been established by a preponderance of the evidence that defendants failed to perform an adequate investigation and analysis of the seismic safety of the Fremont campus prior to construction of the new CSB thereon, and [have] still not accomplished the same" (App. B at 28). The court found that it was still

---

2 Dr. Jahns died prior to the inception of the testing, and the district court appointed two other experts, Dr. David Burton Slemmons and Dr. T. Leslie Youd, to administer the seismic testing and reporting in his stead.

3 "App. B" refers to the Appendix B to the petition.

"unable to make a realistic or meaningful appraisal of the seismic hazard facing CSB students at the Fremont campus," and could not determine whether the applicable statutes had been violated in the absence of the additional tests (id. at 29). The tests consist principally of the digging of investigative trenches and borings on the property, and are detailed in the court's order.

Finally, the district court was of the opinion that, because seismic safety could not be assured in the absence of such tests, "attendance at the Fremont campus may expose students of CSB (members of the plaintiff class) to serious and unreasonable physical risks from seismic occurrences . . . " (id. at 30). It therefore enjoined petitioners from using the Fremont campus to house and educate the CSB students, but stayed that injunction "if defendants cause[d] the timely

performance at their expense and to the satisfaction of the special master of the investigative and other testing work described . . ." (id.).

Petitioners appealed the district court's decision and sought a stay from the Ninth Circuit, which denied the stay on January 18, 1984, holding that petitioners had "not shown a combination of probable success on the merits and the possibility of irreparable injury or that the balance of hardships tips sharply in their favor." Petitioners' subsequent motions for a stay filed in the United States Supreme Court were denied by Justice Rehnquist on February 1, 1984, and by the full Court upon referral by Justice Powell on February 21, 1984.

On February 27, 1984, pursuant to stipulation of the parties, the district court modified its preliminary injunction of December 9, 1983. The

modification permitted petitioners to continue to operate CSB on two conditions: (1) that they proceed with the preliminary steps necessary for the testing to commence prior to the rainy season, and (2) that they agree to commence the required testing immediately if the Ninth Circuit affirmed the district court's decision.

The Ninth Circuit affirmed the preliminary injunction on June 20, 1984. The Ninth Circuit held that the district court had correctly determined that the standard for granting a preliminary injunction had been met, that the trial court had jurisdiction under both EAHCA and section 504, and that the action was not barred by the Eleventh Amendment.

Pursuant to the February 27, 1984 stipulated modification of the district court's December 9 order, seismic safety testing commenced immediately upon

issuance of the Ninth Circuit's opinion. At the present time, all on-site testing and observation has been completed, as described in the November 27, 1984 letter (attached hereto as Appendix A) from Dr. David Burton Slemmons, one of the court-appointed experts supervising the testing, to Armando M. Menocal, III.

ARGUMENT

I. THE APPEAL FROM WHICH A WRIT OF CERTIORARI IS SOUGHT IS MOOT OR WILL BECOME MOOT BEFORE THIS COURT CAN HEAR OR DETERMINE THE ISSUES PRESENTED

As described above, pursuant to the stipulated modification of the preliminary injunction, all on-site testing and observation at the Fremont campus of CSB has now been completed (see Appendix A hereto). Accordingly, the present matter is moot under the principles enunciated by this Court in University of Texas v.

Camenisch, 451 U.S. 390 (1981). There, the preliminary injunction required the University to provide Camenisch (the plaintiff) with a sign-language interpreter pusuant to section 504 of the Rehabilitation Act. The Fifth Circuit affirmed, although by the time it acted, the University had paid for the interpreter and Camenisch had graduated. The Fifth Circuit held the case was not moot because Camenisch had been required to post an injunction bond, so that who was to pay for the interpreter remained a live issue.

This Court reversed, holding that although the case as a whole was not moot, the issue before the Fifth Circuit and hence, before the Supreme Court -- the propriety of the preliminary injunction -- was moot. The Court stated:

> Because the only issue presently before us -- the correctness of the decision to grant a preliminary injunction -- is moot, the judgment of the Court of Appeals must be vacated and the case must be remanded to the District Court for trial on the merits.

451 U.S. at 394. The Court rejected the argument that a decision predicated on preliminary injunction criteria could be equated with a decision on the merits and hence that the preliminary injunction issues were not moot, because this reasoning improperly equated "likelihood of success" with "success" and ignored the "significant procedural differences between preliminary and permanent injunctions." Id.

Camenisch is squarely controlling here. Petitioners do not dispute that they appealed from the preliminary injunction. Nor do they appear to

genuinely dispute that the issues raised by the preliminary injunction are now moot. Petition at 17. Rather, they speculate that the district court might order further seismic testing, major structural modifications, or permanent closure of CSB, and that this Court therefore should review the moot issue of the preliminary injunction for whatever future guidance such review could provide. Id. If the district court were to order further relief, however, its order would not be predicated on the December 9, 1983 preliminary injunction. Petitioners' proposed exception would swallow the rule: in Camenisch and in every other case where any live issue might remain, this Court would be required to review a moot preliminary injunction. This is not the law.

Moreover, as in Camenisch, the terms of the preliminary injunction have been irrevocably carried out (451 U.S. at

398); the on-site testing has been accomplished, and the final report in all likelihood will be completed before this Court determines whether to grant the present petition. A long line of cases in addition to Camenisch establishes that an appeal is moot where the terms of an injunction have been performed and the performance cannot be undone. See, e.g., County of Los Angeles v. Davis, 440 U.S. 625 (1979); Newman v. Alabama, 683 F.2d 1312, 1317 (11th Cir. 1982), cert. denied, 103 S. Ct. 1773 (1983); Sannon v. United States, 631 F.2d 1247, 1251 (5th Cir. 1980); United States v. Board of Education of the City of New York, 543 F.2d 1, 3 (2d Cir. 1976). Here, the only testing required by the preliminary injunction has been done, and cannot be undone.

Further, unlike the situation in Camenisch, no injunction bond was posted and there is no legal basis for petitioners

to recover the monies expended for testing. Accordingly, should the final report of the trial court's experts indicate, and the trial court find, that the Fremont site is seismically safe, there will remain no live issue whatsoever between the parties as to any aspect of the case. Thus, not only would this Court have issued an advisory opinion as to the issues before it, contrary to its decision in Camenisch, but it would have issued an advisory opinion as to the entire matter.

Nor can petitioners avoid the inevitable mootness of this appeal under the rubric of issues which are "recurring but continually evading review." First, should the seismic testing prove the site to be seismically safe, no issues will "recur" in this case. Moreover, it is relatively unlikely that another case challenging the seismic safety of a school site for handicapped children will be

filed under EAHCA or section 504; this is the only such case filed to date. Further, these issues in no sense "evade review"; should the trial court order additional relief in this case, nothing prevents petitioners from seeking review by the Ninth Circuit and this Court at that time. Nor would such review be "evaded" should another case of this type ever be filed.

Conversely, no live issue may remain in this case by the time the Court rules on the petition, if the reports show the campus to be safe. These facts counsel strongly against the Court's deciding here, as requested by petitioners, to depart from Camenisch and instruct the lower courts on the propriety of a moot preliminary injunction. The petition must be denied.

II. THE PETITION IS NOT APPROPRIATE FOR CERTIORARI

A. The Issues Purportedly Presented Are Either Not Ripe for Review or Are Not Presented by the Record

Petitioners concede this Court's "usual reluctance to review interlocutory, non-final orders or orders which have become moot by voluntary compliance." Petition at 16. Petitioners, indeed, somewhat understate the case; this Court has stated that it:

> should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

American Construction Co. v. Jacksonville, Tennessee & Kentucky Railway Co., 148 U.S. 372, 384 (1893); accord, Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S.

251, 258 (1916) (interlocutory nature of issue alone furnished sufficient ground for denial).

In the present case, the Ninth Circuit determined that, contrary to petitioners' arguments, the district court's order was a preliminary injunction and should be reviewed as such, since "the essence of the district court's order [was] preliminary not final" and the "liability of the state defendants will not be finally decided unless and until the tests are performed." App. A at 6.[4/]

Petitioners seek to avoid the normal limitation of this Court's certiorari review by arguing that the trial court has "finally determined" that it has jurisdiction of respondents' claims under EAHCA and section 504 (Petition at

---

4 "App. A" refers to the Appendix A to the petition.

16). By this standard, however, every preliminary injunction would constitute a final determination, since no federal court will enter a preliminary injunction without finding that there is federal jurisdiction of the cause.

Petitioners seek to clothe their appeal in the principles of federalism articulated by this Court in several recent opinions. Petitioners' rhetoric, however, cannot disguise the extreme narrowness of the issues presented by their petition, which are no more than whether a trial court has jurisdiction to consider seismic safety issues under the EAHCA or section 504 and to enter a preliminary injunction predicated on those statutes.

Notably, in their statement of "Questions Presented," petitioners' first and second issues concede as much. Petitioners' third posited question,

whether section 504 requires that a state make reasonable modifications for handicapped children with respect to seismic safety, is not even properly before this Court, since the trial court has not yet finally decided this issue. This Court would be required to decide the issue in a vacuum, since the district court has not even considered what such reasonable modifications might be. The general issue whether reasonable modifications are required by section 504 has already been addressed by this Court in Southeastern Community College v. Davis, 442 U.S. 397 (1979), and little could be added in a case where such reasonable modifications as yet have been neither required nor described.

Petitioners' fourth and final posited issue simply is not raised in the present case. The trial court has never so much as intimated an intent to impose

seismic safety standards other than those implicit in EAHCA, the state law provisions incorporated in EAHCA, or the nondiscrimination standards of section 504. Even more significantly, the trial court has not yet determined the applicable standards under those statutes, so that this Court does not have anything to review in this respect. (Indeed, if the test results are negative, the trial court will never address this question.)

Additionally, the present matter is not appropriate for certiorari because the issue presented -- federal jurisdiction of seismic safety claims under EAHCA and section 504 -- is relatively unlikely to recur in other cases.

Finally, the unusual opinion filed on October 18, 1984 by six judges of the Ninth Circuit, entitled "Dissent from the Failure of the Court to Consider This

Case En Banc" ("dissent") (Appendix 1 to Supplement to Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit) does not alter the petition's inappropriateness for certiorari. Notably, those six judges expressly concurred in the panel's result and in the panel's resolution of all issues, including jurisdiction under section 504, except for the panel's conclusion that EAHCA incorporated the provisions of the California Education Code relating to seismic safety. The dissent discusses only that narrow issue.

EAHCA expressly incorporates state law by defining "appropriate education" as education which "meet[s] the standards of the state educational agency." 20 U.S.C. section 1401(18)(B). The dissent would read this Court's decision in Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900

(1984) ("Pennhurst II") to preclude federal court enforcement of state law provisions expressly incorporated into federal law. Such an extreme position cannot be taken as a serious challenge to the panel's decision, nor can it enhance the appropriateness for certiorari of the present petition. Neither can the dissent's suggestion that only some provisions of the State education code are incorporated in EAHCA, despite the express general incorporation provision of section 1401(18)(B) of EAHCA.

B. Petitioners' EAHCA Arguments Do Not Justify Grant of Certiorari

Petitioners' EAHCA arguments are fully amswered in the Ninth Circuit's opinion (App. A) and will be addressed only briefly here. Petitioners rely on this Court's decision in Board of Education v. Rowley, 458 U.S. 176 (1982),

which held that EAHCA does not require education which maximizes a handicapped child's potential, but only education and special services which meet the standards of the State education agency.

Petitioners, however, ignore the fact that the district court and the Ninth Circuit did no more than apply the literal language of EAHCA and Rowley. Because of the serious seismic hazards posed by the geologic fault structures underlying many areas of California, the California Education Code contains extensive provisions dealing with seismic safety. As the Ninth Circuit stated,

> The students correctly point out that EAHCA does not specifically provide for textbooks, writing materials or appropriately trained teachers, but EAHCA incorporates the state standards that provide those items. We note that California law requires seismic safety of schools. In light of

> specific provisions for seismic safety in the California Education Code, there is a strong argument that a seismically unsafe school would not meet the standards of the state educational agency, and thus, would not be part of an appropriate public education under EAHCA.

App. A at 12.

The suggestion in the dissent that only those provisions of the State education code that relate to special education are incorporated into EAHCA is fully answered by the above analysis. By the dissent's logic, a state would not be required under EAHCA to provide textbooks, classrooms, or instruction in general subjects to handicapped children; yet it was in part precisely to redress such discriminatory denial of education to the handicapped that EAHCA was enacted.

Petitioners also argue that EAHCA does not encompass state "fiscal"

decisions. The decisions whether to properly test a school site for seismic safety and whether to provide seismically safe schools for the handicapped, however, are no more nor less "fiscal" decisions than whether to provide Braille texts, classrooms accessible to the handicapped, or any other aspect of the "appropriate education" required by EAHCA. The two decisions relied on by petitioners involved actions which the state was forced to take directly because of fiscal problems (closing a school, reducing tuition).

Finally, petitioners argue that the decisions of the courts below "significantly broaden" the scope of EAHCA because they are the first to incorporate in EAHCA "every provision" of the State education code (Petition at 13), so that a host of "local issues" will be subject to litigation under EAHCA. In fact, quite

the opposite is true: no court decision to date has so much as suggested that the provision of EAHCA which defines an "appropriate education" as one which complies with state standards does not mean what it says. Petitioners apparently would have the federal courts pick and choose among the requirements of each state's education code to determine which are appropriate for enforcement under EAHCA and which are purely "local" in nature, an exercise nowhere authorized, guided, or even suggested by any of the provisions of EAHCA. Petitioners would have this Court convert what is essentially a straightforward nondiscrimination provision (a state must educate its handicapped children according to the same standards it applies in educating other children) into a thorny exercise in judicial legislation.

Finally, contrary to petitioners' suggestions, the decisions below are in no way contrary to the Eleventh Amendment or to this Court's decision in Pennhurst II. Nothing in Pennhurst II so much as implies any limitation on Congress's long-established power to incorporate state law provisions into federal statutes, nor on the federal courts' time-honored power to enforce, as a matter of federal law, the state standards so incorporated.

C. Petitioners' Section 504 Arguments Do Not Justify Grant of Certiorari

Petitioners argue that the courts below expanded section 504 to improperly mandate "functional equivalency" of facilities for the handicapped, and hence "affirmative action," which they argue was proscribed by this Court in Davis. This argument is manufactured out

of whole cloth, and ignores the clear terms of both lower courts' decisions.

As the Ninth Circuit recognized, respondents have contended throughout that, even leaving aside the special susceptibility of CSB's blind, multihandicapped students to seismic hazards, CSB was not tested as adequately as other California schools and is not as safe as other schools. (App. A at 16.) This is a classic discrimination claim, alleging denial of equal treatment: if such direct discrmination is not proscribed by section 504, nothing is.

In addition, the Ninth Circuit recognized that the regulations implementing section 504 require a recipient of federal funds to make "reasonable accommodations" to avoid discriminating against otherwise qualified handicapped individuals, and that this Court's decision in Davis did not suggest otherwise. App. A

at 16-17. Thus, the Ninth Circuit's decision, contrary to petitioners' argument (Petition at 10-11, 14-15), does not "broaden" section 504 beyond the implementing regulations, the decisions of every other federal court which has considered the statute, and this Court's decision in Davis. The decision does not so much as intimate, let alone hold, that "functional equivalency" (whatever that may be) is required.

Finally, and perhaps most crucially, the district court has not yet determined that reasonable -- or any -- modifications are required by section 504, nor has it so much as considered that issue. Certainly, no such modifications are required by the district court's preliminary injunction, the sole issue before this Court at this time.

Accordingly, petitioners' section 504 arguments are simply irrelevant to this Court's consideration of the Petition, and can provide no basis for grant of certiorari.

CONCLUSION

For the reasons set forth above, the Petition should be denied.

Dated: December 6, 1984.

ARMANDO M. MENOCAL, III
PUBLIC ADVOCATES, INC.

*WILLIAM ALSUP
PENELOPE A. PREOVOLOS
MORRISON & FOERSTER

MICHAEL BROOKS CARROLL
CARROLL, WELLER & HAINES

Attorneys for Respondents

---

*Counsel of Record/Member Supreme Court Bar

APPENDIX A

DAVID BURTON SLEMMONS
Consulting Geologist
2995 Golden Valley Road
Reno, Nevada 89506

(702) 972-4965

November 27, 1984

Mr. Armando M. Menocal, III
Public Advocates, Inc.
1535 Mission Street
San Francisco, California 94103

Dear Mr. Menocal, III:

I am responding to your letter of February 19, 1984 and to the brief telephone discussion earlier today. My answers to your three questions are also based on telephone conferences with Dr. Leslie Youd.

(1) To what extent is the investigation completed?

The field studies at the site have been completed. These included the exploratory trenching, penetration and cone penetration tests, and hydrologic studies carried out by Lockwood-Singh & Associates. Their draft report should be completed in December and their final report by mid-January.

(2) Have all of the on-site investigations and observations been completed?

The on-site investigations have been completed. I will finish an aerial photograph review during the next 45 days, but this study will not include any on-site investigations.

(3) When do you expect to file your final report with the court?

Dr. Youd and I will start our report after we receive the Lockwood-Singh & Associates final report. Our report should be submitted about 60 days later.

Sincerely,

/s/ David B. Slemmons

David B. Slemmons

cc. Judge Schwartz
Michael Brooks Carroll, Esq.
Dennis Eckhart, Esq.
T. Leslie Youd

SUPREME COURT OF THE UNITED STATES

BILL HONIG, SUPERINTENDENT OF PUBLIC INSTRUCTION OF CALIFORNIA, ET AL. *v.* STUDENTS OF THE CALIFORNIA SCHOOL FOR THE BLIND ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–436. Decided April 1, 1985

PER CURIAM.

Respondents, students of the California School for the Blind, brought this lawsuit in Federal District Court against petitioner state officials, claiming among other things that the school's physical plant did not meet applicable seismic safety standards. Their complaint alleged rights of action under the Education for All Handicapped Children Act of 1975, 89 Stat. 773, 20 U. S. C. §§ 1232, 1401, 1405, 1406, 1411–1420, 1453, and § 504 of the Rehabilitation Act of 1973, 87 Stat. 384, as amended, 29 U. S. C. § 794. After a lengthy trial the District Court issued a "preliminary injunction" requiring the State to conduct additional tests of school grounds to aid in assessment of the school's seismic safety. Petitioners appealed to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U. S. C. § 1292(a)(1). That court affirmed the issuance of the preliminary injunction on the ground that the lower court had not abused its discretion. The court expressly noted that it was not finally deciding the merits of the action, but only was assessing the District Court's reasoning to determine whether it had appropriately applied the traditional calculus for granting or denying preliminary injunctions. 736 F. 2d 538, 542–543, 546–547, 550 (1984).

Petitioners have petitioned this Court for a writ of certiorari to review the judgment of the Ninth Circuit, but in the meantime the tests ordered by the District Court's prelimi-

nary injunction have been completed. We therefore are confronted with a situation nearly identical to that addressed in *University of Texas* v. *Camenisch*, 451 U. S. 390 (1981), in which the petitioners had completely complied with the terms of a preliminary injunction by the time the case reached this Court. In *Camenisch* we concluded that "the question whether a preliminary injunction should have been issued here is moot, because the terms of the injunction . . . have been fully and irrevocably carried out." *Id.*, at 398. Because only that aspect of the lawsuit was moot, however, we merely vacated the judgment of the Court of Appeals, and remanded the case for further proceedings. *Ibid.* Here, as in *Camenisch*, the only question of law actually ruled on by the Court of Appeals was whether the District Court abused its discretion in applying the complicated calculus for determining whether the preliminary injunction should have issued, an issue now moot. No order of this Court could affect the parties' rights with respect to the injunction we are called upon to review. Other claims for relief, however, still remain to be resolved by the District Court. We accordingly grant the petition for writ of certiorari, vacate the judgment of the Court of Appeals, with instructions to remand the case to the District Court for further proceedings consistent with this opinion.

JUSTICE POWELL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

BILL HONIG, SUPERINTENDENT OF PUBLIC INSTRUCTION OF CALIFORNIA, ET AL. *v.* STUDENTS OF THE CALIFORNIA SCHOOL FOR THE BLIND ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-436. Decided April 1, 1985

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

Although I agree with the majority that a case such as this could be moot if the full burden imposed by the preliminary injunction has passed, it is not at all clear that that is the situation here. If this case is moot, the facts making it moot occurred subsequent to the Court of Appeals decision, and so do not appear on the record. That makes this case quite distinct from *University of Texas* v. *Camenisch*, 451 U. S. 390 (1981), where the issue of mootness had been raised, argued, and decided by the Court of Appeals. In the instant case, this Court has received no papers from the parties on this issue other than a petition for certiorari and a response. In those papers, neither party has assured the Court that the factual premises of mootness have actually been fulfilled, nor have the parties agreed that the case is moot. Since the Court has not requested any supplemental information or argument from the parties, the Court is determining that the case is moot without a clear understanding of the facts of the case or their precise legal implications for the parties. I cannot accept that the Court can simply assume, as a factual matter, that mootness exists. We should inform the parties of our suspicion as to mootness and allow briefing on the issue. Absent this procedure, I dissent.

Mootness is mentioned twice in the papers before the Court. First, petitioners argue in their petition for certio-

rari that the case is not moot in spite of the fact that "by the time this Court considers the instant petition, the state officials may well have already complied with the injunction . . . ." Pet. for Cert. 17. Leaving aside the merits of their arguments that full compliance would not render the action moot, their statement is hardly sufficient to inform the Court that there has been full compliance.

This theme is repeated in the respondents' opposition. Respondents assert that the tests ordered by the District Court have been completed "and the final report *in all likelihood* will be completed before this Court determines whether to grant the present petition." Brief in Opposition 14 (emphasis added). The opposition goes on to assure the Court that "should the final report of the trial court's experts indicate, and the trial court find, that the Fremont site is seismically safe, there will remain *no live issue whatsoever* between the parties as to *any* aspect of the case." *Id.*, at 15 (emphasis in original). Although respondents have vigorously argued that once certain events occur this case will become moot, they have stopped conspicuously short of assuring the Court that those events have occurred. Indeed, they do not argue that the case is moot, but instead argue that the case "will become moot before [the] Court can hear or determine the issues presented." *Id.*, at 10.

In support of the opposition, respondents have attached to their filing a letter written by a consulting geologist who presumably is doing work that the preliminary injunction requires petitioner to have done. The letter, like the pleadings stops short of informing this Court of the completion of all work done pursuant to the District Court's preliminary injunction. Dated November 27, 1984, the letter states that additional review of aerial photographs will be completed in "the next 45 days," that a draft report by investigators "should be completed in December" to be followed by a final report "by mid-January," and that the consulting geologists'

report "should be submitted about 60 days later." App. to Brief in Opposition 1–2.

The last filing in this case was the opposition, filed on December 7, 1984, and that, as I discussed above, went no further than to predict events in the following months that would render the case moot in respondents' view. If the situation is still as it was there described, the case may well not yet be moot. Although it is well understood that it is "the duty of counsel to call such facts [as would suggest mootness] to [this Court's] attention," R. Stern & E. Gressman, Supreme Court Practice 896 (5th ed. 1978), nothing has been received since.

Although the Court may believe that the end is so near that it can safely be assumed, the future may well hold surprises for the parties as well as for the Court. A clear understanding of the facts of a case and of their legal implications should be a prerequisite to disposing of a case as moot. This case is a complex one and prior to disposition on mootness the parties should be informed of the Court's suspicion as to mootness and be asked to provide the Court with facts and arguments. Because this was not done, I dissent.